118-634

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 1241. 820

JOHN P. DELANO, PLAINTIFF IN ERROR,

vs.

PETER BUTLER, RECEIVER OF THE PACIFIC NATIONAL BANK OF BOSTON.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF MASSACHUSETTS.

FILED JANUARY 4, 1886.

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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Massachusetts, Greeting:

[Seal of the Circuit Court, Massachusetts.]

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said circuit court before you between Linus M. Price, of Newark, in the State of New Jersey, a citizen of said State, receiver of the Pacific National Bank of Boston, plaintiff, and John P. Delano, of Bath, in the State of Maine, and a citizen thereof, defendant, in an action of contract, a manifest error hath happened, to the great damage of the said defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

JOHN G. STETSON,
Clerk of the Circuit Court of the United States, District of Massachusetts.

Allowed by—
LE BARON B. COLT,
Judge U. S. Circuit Court, First Judicial Circuit.

2 Circuit Court of the United States.

DISTRICT OF MASSACHUSETTS, *ss:*

And now, here, the judges of the circuit court of the United States in and for the district of Massachusetts make return of this writ by annexing hereto and sending herewith, under the seal of the said circuit court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In testimony whereof I, John G. Stetson, clerk of said circuit court of the United States in and for the district of Massachusetts, have hereto set my hand and the seal of said court this fifth day of October, A. D. 1885.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

Declaration. (*Filed with Plaintiff's Writ.*)

3 UNITED STATES OF AMERICA, *Massachusetts District*, } *ss:*

At a circuit court of the United States for the first circuit, begun and holden at Boston, within and for the district of Massachusetts, on Friday, the fifteenth day of May, in the year of our Lord one thousand eight hundred and eighty-five, before the Honorable Le Baron B. Colt, circuit judge.

LINUS M. PRICE, of Newark, in the State of New Jersey, and a Citizen thereof, as he is Receiver of the Pacific National Bank of Boston, Plaintiff,

v.

JOHN P. DELANO, of Bath, in the State of Maine, and Citizen thereof, but now Commorant of Boston, in the District of Massachusetts, Defendant.

4 In an action of contract.

Plaintiff says that the Pacific National Bank of Boston, heretofore and prior to the acts herein mentioned, was duly organized and authorized to do business as a national bank or banking association, under and by virtue of an act of Congress entitled "An act to provide a national currency secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved on the 3d day of June, A. D. 1864, and which said provisions are embraced in title sixty-two of the Revised Statutes of the United States, located and having its banking house at Boston, in [the] State of Massachusetts; that said banking association thereupon proceeded, and for a long time thereafter continued, to issue currency and receive deposits of money, discount negotiable paper, and generally to transact the business of a national banking association, as authorized by the aforesaid act of Congress; that in its said business as aforesaid the said banking association contracted, prior to the 22d day of May, A. D. 1882, large debts and liabilities, and that, to wit, on the 22d day of May, A. D. 1882, the Comptroller of the Currency of the United States was satisfied from a report of proceedings of the board of directors of the Pacific National Bank of Boston, previously made to said comptroller, that said banking association, the Pacific National Bank of Boston aforesaid, was insolvent and unable to pay its debs and liabilities; that the said Comptroller of the Currency, upon being satisfied of the insolvency of said banking association as aforesaid, did, to wit, on the 22d day of May, A. D. 1882, and as authorized and empowered to do by virtue of section one of an act of Congress entitled "An act authorizing the appointment of receivers of national banks, and for other purposes," approved on the 30th day of June, A. D. 1876, duly appoint the said Linus M. Price receiver of all the property, books, records, and assets of the said banking association as is provided by law. And the said Linus M. Price accepted said appointment and duly qualified as such receiver aforesaid, and executed such bond and with such surety as required by

the laws of the United States, and approved by said comptroller, and which said appointment more fully appears by a copy thereof hereto annexed, marked "Schedule A," or to the original of which, ready to be produced in court, the said plaintiff craves leave to refer; that thereupon the plaintiff, under the direction of the said comptroller, took possession of the books, records, property, and assets of every description of the Pacific National Bank of Boston aforesaid, and has ever since been, and is now, engaged in collecting and converting the assets thereof and discharging in other respects the lawful duties of his said receivership.

And the plaintiff avers that the property and assets of said banking association are insufficient to pay and satisfy its debts and liabilities contracted as aforesaid, and that in order to provide for the paying of the same it became and was, and is now, necessary to enforce the personal liabilities of the stockholders, as is provided and imposed by said act of Congress.

And the said plaintiff further avers that the said Comptroller of the Currency did ascertain and determine, upon data satisfactory to him, that the assets and credits of said association were insufficient to pay its said debts and liabilities, and that in order to provide the money necessary to pay said debts and liabilities of said association it was necessary to enforce the individual liability of the shareholders of said association, as provided by the aforesaid act of Congress, and especially by the twelfth section thereof (section 5151 U. S. Rev. Statutes), and that said comptroller, in pursuance of the powers for that purpose vested in him by the aforesaid act of Congress, and to that end, did, to wit, on the 27th day of November, A. D. 1882, order and make an assessment upon the said shareholders of said association, including the said defendant in this action, and each and every one of them, equally and ratably, to the amount of one hundred dollars per centum ($100 per cent.) of the par value of the shares of the capital stock in the said association held or owned by them respectively, including the defendant, at the time of its insolvency, failure, or suspension as aforesaid, which said assessment more fully appears by a copy of the order making the same hereto annexed, marked "Schedule B," or to the original thereof, ready in court to be produced, and to which the said plaintiff craves leave to refer.

And the said plaintiff further avers that the said comptroller has decided that it is now necessary to institute a suit or suits against the said shareholders, including the defendant, to enforce their said personal liability, and to that end has ordered and directed the said plaintiff to institute, in the proper court or courts, such suit or suits as may be necessary to enforce against each and every shareholder of the said association, equally and ratably, his or her personal liability as such shareholder, in manner and to the extent provided by the twelfth section of said act (section 5151 U. S. Rev. Statutes)—that is to say, the rate of one hundred per cent., hereinbefore specified.

And the said plaintiff further avers that the said defendant was at the time of said insolvency, failure, or suspension of said banking association a shareholder of its capital stock to the amount of sixty

shares, of the par value of one hundred dollars per share, and of the aggregate value at par of six thousand dollars, and held or was entitled to hold in his possession or control the usual stock certificates as such shareholder in said banking association, and that, to wit, on the first day of December, A. D. 1882, the said plaintiff made demand in writing upon the said defendant as such shareholder for payment of the sum of six thousand dollars, the amount of said assessment so made as aforesaid, under and by virtue of the order of the Comptroller of the Curreny, hereto annexed and marked "Schedule B" as aforesaid.

And the said plaintiff avers that, by reason of the premises, the said defendant has become, and now is, indebted and liable to pay to the plaintiff, as such receiver, one hundred per cent. of the amount of said capital stock—that is, one hundred dollars upon each and every share so held and owned by the said defendant at the time of the declared insolvency, failure, and suspension of said banking association as aforesaid, and which said liability or indebtedness of the defendant amounts in the whole to the sum of six thousand dollars, which said sum of money so due, owing, and payable to the said plaintiff as receiver aforesaid, though often requested, the said defendant has not paid *the same*, or any part thereof, but has wholly neglected and refused, and still does neglect and refuse, so to do.

The defendant owes the plaintiff the said sum with interest thereon, which is demanded, to the damage of said plaintiff, as he says; the sum of twelve thousand dollars.

SCHEDULE A. Referred to in Foregoing Declaration.

WASHINGTON, *May* 22, 1882.

Whereas it appears from the report of proceedings of the board of directors of The Pacific National Bank of Boston, located in the city of Boston, county of Suffolk, and State of Massachusetts, at a meeting held on May 20, 1882, that the said bank is insolvent, and being satisfied that the said bank is insolvent and unable to pay its just and legal debts:

Now, therefore, I, John Jay Knox, Comptroller of the Currency, in pursuance of the power and authority vested in me by law, and under the provisions of sect. 1 of an act of Congress entitled "An act authorizing the appointment of receivers of national banks and for other purposes," approved June 30, 1876, do hereby appoint Linus M. Price receiver of the Pacific National Bank of Boston, with all the powers, duties, and responsibilities given to or imposed upon a receiver, under provisions of the Revised Statutes of the United States, which authorize the appointment of a receiver.

In witness whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-second day of May, A. D. 1882.

[L. S.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

SCHEDULE B. Referred to in Foregoing Declaration.

In the Matter of "THE PACIFIC NATIONAL BANK OF BOSTON," MASSACHUSETTS.

To all whom it may concern:

This is to certify that I have taken an accounting of the condition of the estate of the Pacific National Bank of Boston, Massachusetts, aforesaid, and of its assets and liabilities, and I do find and determine, upon data satisfactory to me, that in order to provide the money necessary to pay the debts of said association it is necessary now to enforce to the extent hereinafter mentioned the individual liability of the shareholders of said association, provided for by the twelfth section of the act of Congress entitled "An act to provide a national currency," approved June 3, 1864, and by sect. 5151 of the Revised Statutes of the United States, approved June 22, 1874, and to that end, and in pursuance of the powers vested in me by the said acts, I have made and hereby order and make an assessment or requisition upon the shareholders of said association or bank, and each and every one of them, equally and ratably, to the amount of one hundred per centum of the par value of the shares of the capital stock in the said association held or owned by them respectively at the time of its failure or suspension, and I direct Linus M. Price, receiver, heretofore appointed, of the said association, to take the necessary proceedings, by suit or otherwise, to enforce to that extent the said individual liability of the said shareholders.

In witness whereof I have hereto set my hand and caused my seal of office to be affixed to these presents, at the city of Washington, in the District of Columbia, this twenty-seventh day of November, A. D. 1882.

[L. S.] (Signed) JOHN JAY KNOX,
Comptroller of the Currency.

6 The writ in this cause is dated the fourteenth day of March, A. D. 1883, and was duly entered at the May term of this court, A. D. 1883, when and where the parties appeared by their respective attorneys.

This casue was thence continued from term to term to the May term, A. D. 1884, when, on the sixteenth day of June, the following answer was filed:

Defendant's Answer. (*Filed June* 16, 1884.)

And now comes the said defendant, and, for answer to the said plaintiff's writ and declaration, denies each and every allegation therein contained; and this denial is intended to apply to all the allegations regarding said plaintiff's appointment and authority as receiver as well as to all other material allegations in said writ and declaration contained.

And, in addition to such general denial, the defendant further denies that at the time of said alleged insolvency, failure, or suspension of said national banking association and of said alleged decision

and order of the Comptroller of the Currency he, the said defendant, was a shareholder in said banking association, or held, or was entitled to hold, any certificate or certificates of any shares of its capital stock.

And the defendant further denies that any such shares or certificates of stock as were issued to or held by him, if any such there were, were ever legally or properly issued, or were ever valid or existing shares or certificates of stock. And he says that such shares or certificates of stock, if any there were issued to him, or held by him, were illegally issued in violation of law, and cannot therefore form the basis of any liability to assessment or other personal liability, as claimed by said plaintiff.

And, further answering, the defendant says that the assessment upon said stock or shares set forth in the plaintiff's declaration, if any such was ever made, was an unlawful and void assessment, and that no action lies to recover the same by said plaintiff.

And, further answering, the defendant says that in the month of January, 1882, he received notice and information from the Comptroller of the Currency of the United States and his agents, then being in the lawful possession of said bank and all the assets, records, and books of account of said banking association, with the duty imposed upon them to ascertain and report the standing and condition of said bank, that said bank was insolvent; that its capital stock was wholly lost; that the debts and liabilities thereof
7 were greater than the whole amount of its assets and its capital stock, and that said bank must pass into the hands of a a receiver, and the payment of an amount equal to his capital stock in said bank at its par value would be then demanded of each stockholder under the provisions of section 5151 of the Revised Statutes of the United States, and enforced under the provisions of section 5234 of said statutes, for the payment of said debts and liabilities, unless said stockholders would voluntarily pay such amount, to be applied as aforesaid, thereby relieving themselves from any further liability under said section 5151 of the aforesaid statutes. Whereupon the defendant, relying upon such representations and assurances of said comptroller and his agents aforesaid, voluntarily paid, upon each and every share of the capital stock of said association owned by him, a sum of money equal to the par value of each of said shares, for the purpose of paying, and which was applied in payment of, the debts and liquidating the liabilities of said association, whereby the defendant fully satisfied and discharged all the liability imposed upon him by said section 5151 of said statutes and became fully discharged from the liability set forth against him in the plaintiff's declaration; and in consequence of which payment the defendant says that the said Comptroller of the Currency had no power or authority to make, order, or levy any such assessment as is described in said declaration.

And the defendant, further answering, says that he has fully paid, satisfied, and discharged the alleged claim and liability set forth against him in the plaintiff's declaration.

And the defendant, further answering, says that in January, 1882,

the stockholders of said association voluntarily made an assessment upon all the shares of stock by them held therein, to the amount of one hundred per centum upon the par value thereof, which said assessment upon the shares held by the defendant was paid by him, and the money so paid appropriated to the payment of the debts of said association, whereby the defendant was discharged from the liability set forth in the declaration, and said comptroller deprived of the power to make or order any such assessment as is described in the declaration.

And, further answering, the defendant says that in the month of September, in the year 1881, an attempt was made by the directors of said banking association to increase its capital stock to one million dollars by the issue of 5,000 shares of new stock; that said attempt was never carried out or perfected; that new stock in said banking association, with a capital of one million dollars, was never issued, but that certain other so-called new stock was fraudulently, irregularly, and illegally issued, and that in ignorance of the facts the defendant became the holder of some of said so-called new shares; that the defendant was induced to become the holder of said so-called new stock by fraud, and by being induced to believe, and believing, that the same was regularly and legally issued to the amount of 5,000 shares ($500,000), and that at the time of such issue said bank was solvent; whereas in fact said shares were not issued to said number or amount, nor in conformity with law, and said bank was then deeply and wholly insolvent.

8 And, further answering, the defendant says that whatever cause of action ever existed upon any such shares of stock as are described in said declaration existed upon stock held by the defendant as executor, administrator, guardian, [or] trustee, and that this defendant in said capacity has not in his hands any assets with which to pay said assessment, or any part thereof, and that this defendant is not personally liable therefor.

By his attorney, BENJAMIN N. JOHNSON.

This cause was thence continued to the October term, A. D. 1884, when, on the eleventh day of November, the following agreement was filed:

Agreement to Waive Trial by Jury. (*Filed November* 11, 1884.)

In the above action the parties thereto waive a trial by jury and agree that said action be submitted to the court.

A. A. RANNEY,
Attorney for Plaintiff.
BENJAMIN N. JOHNSON,
Attorney for Defendant.

This cause was thence continued to this present term, when, on the third day of September, A. D. 1885, the same comes on to be heard and is fully heard by the court. Thereupon the court make their findings of facts in this cause and direct that the same be filed as of September 8, A. D. 1885, and the same are filed accordingly as follows:

9 *Findings of Facts by the Court.* (*Filed as of September* 8, 1885.)

The court makes the following findings of facts—Le Baron B. Colt, circuit judge:

Statement of Facts Found by the Court.

The Pacific National Bank was organized and constituted a corporation as a national banking association, by virtue of the laws of the United States relating to national banks, on or about the tenth day of October, 1877, and located in Boston. Its articles of association, marked "Exhibit 1," and also its by-laws, marked "Exhibit 2," are hereto annexed.

The capital stock was fixed in said articles of association at $250,000, with the right to increase the same to a sum not exceeding $1,000,000. The capital of $250,000 was paid in cash, and said bank commenced and continued the banking business with that capital until the eighth day of November, 1879, when its capital was increased to $500,000, and the increase paid in in cash, and said bank continued its business until on or about the thirteenth day of September, A. D. 1881, when certain proceedings were had with reference to a further increase of the capital stock to $1,000,000. These proceedings were as follows: A vote was passed at a meeting of the directors of said bank held in Boston Sept. 13, 1881, increasing the capital stock to $1,000,000, a copy of which record of the meeting is hereunto annexed, marked "Exhibit 3."

The board of directors consisted at that time of twelve persons.

A notice of the passage of that vote was sent by the cashier of said bank to each stockholder, a copy of which is hereunto annexed, marked "Exhibit 4."

The whole amount of the increase of capital to $1,000,000, being $500,000 in addition to the old stock, was never taken or paid in, and no notice was ever transmitted to the Comptroller of the Currency that said additional $500,000 had been paid in, or that the whole amount of such proposed increase of the capital to
10 $1,000,000 had been paid in; and the comptroller never issued a certificate stating that said capital stock had been increased to the amount of $1,000,000, voted on said thirteenth day of September, 1881, as hereinbefore stated; nor did said comptroller ever certify his approval of such increase, or that it had been duly paid in as a part of the capital of said association, and no action was taken by him respecting any increase of stock from that of $500,000, except as hereinafter stated.

Only $461,300 of said proposed increase of $500,000 was ever subscribed, taken, or paid in, all of which was paid in prior to Nov. 18, 1881, and was used in the general business of the bank with its other funds.

On the eighteenth day of November, 1881, said bank became unable to meet its debts and liabilities, suspended payment thereof, failed to redeem its circulating notes, and thereupon closed its doors to business.

Daniel Needham, a duly appointed examiner of national banks, having made an examination of said bank, reported its condition to the Comptroller of the Currency, and was on said eighteenth day of November, 1881, placed in charge and possession of said bank and all its funds, assets, records, and books by said comptroller. Said bank remained under the exclusive charge and in the possession of said Needham, with its doors closed to business, until on or about March 18, 1882, the directors thereof having in the meantime no possession or control over the assets of said bank, or the moneys received or paid out on account of the bank, except under the supervision, control, and authority of said examiner.

In a report made to the Comptroller of the Currency by Examiner Needham on or about the twenty-ninth day of November, 1881, he makes the following statement, viz:

In looking over the assets and liabilities I consider the bank and its shareholders in a most precarious condition, and unless Mr. Weeks can furnish the equivalent of at least $500,000 in current funds, and the stockholders pay in $1,000,000 more, I would not consider even the possibility of reorganization; * * * the stockholders must, in any event, for the time being, sink their entire capital. * * * My view of the situation, from the first, has been
11 of the most serious character. Much of the paper upon which reliance is placed to me looks doubtful, and I am yet to be convinced that the losses may not approximate $1,750,000, possibly more.

A copy of said report, except the schedule annexed to it, is annexed, marked "Exhibit 5."

Dec. 13, 1881, the comptroller sent a letter to Needham, a copy of which is hereunto annexed, marked "Exhibit 6."

Dec. 14, 1881, Needham replied by letter, a copy of which is hereunto annexed, marked "Exhibit 7."

A copy of the resolution passed by the directors, and forwarded to the comptroller, Dec. 14. 1881, and referred to in Needham's said letter of Dec. 14, 1881, is hereunto annexed, maked "Exhibit 8."

During the suspension of said bank, viz., Dec. 13, 1881, the directors of said bank passed the following vote, viz:

Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable Oct. 1;

And whereas $461,300 of said new stock has been taken and paid in;

And whereas $38,700 thereof has not been taken and paid in:

Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300,

and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law.

On the same day J. M. Pettengill, cashier of said bank, acting under direction of said directors and upon the suggestion of the comptroller that such a certificate should be sent to him, sent the following certificate to the Comptroller of the Currency, sworn to by the cashier, viz:

12 PACIFIC NATIONAL BANK OF BOSTON,
December 13, 1881.

To the Comptroller of the Currency, Washington, D, C.:

It is hereby certified that the capital stock of "The Pacific National Bank of Boston" has been increased pursuant to the articles of association of said bank in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred [and] sixty-one thousand three hundred dollars.

[SEAL.] J. M. PETTENGILL, *Cashier.*

Which was accompanied by a copy of the foregoing vote of the directors passed December 13, 1881; upon the receipt of which the comptroller, December 16, 1881, sent to the directors of the bank the following certificate:

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of "The Pacific National Bank of Boston, Mass.," has been increased in the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

Now, it is hereby certified that the capital stock of "The Pacific National Bank of Boston, Mass.," aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof I hereunto affix my official signature.

[SEAL.] JOHN J. KNOX,
Comptroller.

There was no vote of the stockholders of said association passed relating to increase or reduction of its capital stock.

On the same sixteenth day of December, 1881, the Comptroller of the Currency sent to the Pacific National Bank the following communication, viz:

13 WASHINGTON, *December* 16, 1881.

The Pacific National Bank of Boston, Massachusetts:

The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent. upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL.] JOHN JAY KNOX,
Comptroller of the Currency.

And at the same time forwarded a letter to Examiner Needham as follows, viz:

WASHINGTON, *Dec.* 16, 1881.

SIR: Your letter of the 14th inst. is received and contents noted. I have this day transmitted to the directors of the Pacific National Bank of Boston my certificate of approval of the increase in its capital stock, thus making the aggregate capital $961,300, upon which an assessment of 100 per cent. has just been ordered.

You will please remain in charge of the bank, either in person or by a representative (if the latter your clerk should be selected), until the full amount of the assessment shall have been paid in, reporting to me from time to time the progress made in this direction.

Very respectfully, JNO. J. KNOX,
Comptroller.

Daniel Needham, national bank examiner, Boston, Mass.

On Jan. 10, 1882, during the time of the suspension of said bank, the stockholders held their annual meeting, being the only
14 meeting of the stockholders held since Jan. 11, 1881, the notice of which was as follows:

Pacific National Bank.

The annual meeting of the stockholders of this bank for choice of directors and for any other business that may legally come before them will be held at their banking rooms, 105 Devonshire street, on Tuesday, Jan. 10, 1882, at 11 o'clock a. m.

J. M. PETTENGILL, *Cashier.*

Which was duly published in the Boston Daily Advertiser.

A copy of the record of said meeting is annexed, marked "Exhibit 9."

The total amount paid in by the stockholders on the assessment agreed upon at said meeting [of] Jan. 10, 1882, was $742,800, and was all paid in prior to May 20, 1882.

On said March 18, 1882, by permission of the Comptroller of the Currency, the directors took possession of the assets of said bank, opened its doors to business, and continued to do a general banking business, loaning money, receiving and paying deposits, and paying debts and expenses, until the twentieth day of May, 1882, but made no losses on new loans during that period. The bank was closed to business on said May 20, 1882, and the directors voted to go into liquidation; and thereupon Linus M. Price, the plaintiff, was appointed receiver thereof by the Comptroller of the Currency, and has ever since been in charge of said bank and its assets, books, papers, and records.

Record of directors' meeting, Nov. 19, 1881, is annexed, marked "Exhibit 10."

Letter, Needham to Knox, Nov. 26, 1881, is annexed, marked "Exhibit 11."

The report of Needham to the comptroller, dated March 11, 1882, embracing Needham's letter to the directors and their reply, is annexed, marked "Exhibit 12."

A communication dated March 14, 1882, signed by W. J. Best and approved by Lewis Coleman and other directors, as per their indorsement thereon, addressed to the comptroller, was forwarded to him, a copy of which is annexed, marked "Exhibit 13."

The reports of Needham and directors in this statement
15 state correctly the assets and liability of the bank at the time reported, but the assets did not prove of the value therein stated.

The amount due depositors March 18, 1882, was $4,101,365.91. The amount of deposits made between March 18, 1882, and May 20, 1882, was $2,338,617.21. The amount due depositors May 20, 1882, was $2,052,957.82, of which $62,693.40 is due to new depositors.

The receiver had realized from the assets of the Pacific National Bank that came into his possession, in cash, $185,266.84, prior to June 23, 1883, and the best judgment he could form June 23, 1883, of the value of the remaining assets was $290,000; the nominal value of the assets which came into his hands at the time he took possession of the bank was about $3,400,000; the actual value of the same assets was less than $500,000; the amount of the liabilities of the bank at the time he took possession, on the twenty-third day of May, 1882, was $2,400,000.

The assets which were in the bank Nov. 18, 1881, came into the receiver's hands when he took possession of the bank, except such as had been collected and applied to the payment of the debts and expenses of the bank and such as had been surrendered on compromise in settlement of doubtful assets.

16 The bank on resumption failed to secure again the confidence of the business community; they found that they could do, and did in fact do, very little business in banking, the bank being compelled to have a rediscount at other banks of all paper discounted by it in order to put it in funds with which to meet present liabilities.

"On September 13, 1881, and long before that date, the surplus and undivided profits of said bank then and for some time thereafter nominally standing upon the books of said bank had been in fact exhausted, and the capital stock of the said bank had been wholly lost through losses by bad debts and by loans improvidently made by said bank; * * * in fact, the bank at that time had lost its entire capital and was then insolvent; * * * said bank when it suspended or failed, Nov 18, 1881, was deeply and hopelessly insolvent; * * * on Sept. 13, 1881, the directors voted an increase of the capital stock, the old stockholders having the right to take up the new stock at par; the actual condition of the bank was misstated to or concealed from the stockholders and the Comptroller of the Currency, and thereby the stockholders were induced to take up the new stock at par, and to pay into the bank money for the same, to the amount of $461,300; * * * the bank after obtaining the sum of $461,300 for said new stock continued in business till Nov. 18, 1881, when it
17 failed; at the time of the failure the capital of the bank had all been lost, together with the $461,300 paid in for subscriptions to new stock, that being all which was subscribed for on the increase voted Sept. 13, 1881.

An assessment was made by the Comptroller of the Currency, and demand of payment thereof duly made, as is stated in the declaration in this action.

The whole amount collected of the shareholders by voluntary assessment, $742,800, was used by the bank to pay its debts to creditors.

Creditors to the amount of $2,104,931.26 signed an agreement of extension, a copy of which is annexed, marked "Exhibit 14," all signed before March 18, 1882.

Three creditors, after March 18, 1882, and before May 20, 1882, brought suits against the bank upon claims amounting in the aggregate to $55,000, in which assets were attached to the amount of $156,000, and these suits are still pending. To dissolve these attachments bonds were given by the bank, one March 24, 1882, in the penal sum of $25,000; one April 29, 1882, in the penal sum of $20,000; one March 31, 1882, in the penal sum of $30,000. On each of
18 these bonds Lewis Coleman and John Shepard were sureties. To indemnify them against liability as such, assets of the bank were placed in their hands to the nominal value of $156,000, being a part of the $3,400,000 assets which came into the hands of the receiver and are among those classed doubtful by the receiver.

There are new liabilities contracted subsequent to March 18, 1882, to an amount of $200,000 (including the $62,693.40 due new deposi-

tors), being indebtedness due to individual depositors and to banks, and balance due on notes rediscounted.

The sum of $643,700 only had been paid on the voluntary assessment voted at the meeting of Jan. 10, 1882, before March 18, 1882, and $99,100 was paid in addition thereto after that date, and before May 20, 1882. The rest of the one hundred per cent. voted at said meeting has never been paid.

Circulars, copies of which are annexed, marked respectively Exhibits 15, 16, 17, were issued and sent, Exhibit 15 to the depositors, Exhibit 16 to those who had not then paid the voluntary assessment aforesaid, and Exhibit 17 to creditors of the bank.

19 *Exhibits Annexed to Findings of Facts by the Court.*

EXHIBIT 1.

Articles of Association.

For the purpose of organizing an association to carry on the business of banking under the sections of the Revised Statutes which authorize the organization of national banking associations, approved June 22d, 1874, and of subsequent acts in addition to or amendatory thereof, the undersigned subscribers for the stock of said association do enter into the following articles of association:

First. The name and title of this association shall be "The Pacific National Bank of Boston."

Second. The place where its banking house or office shall be located and its operations of discount and deposit carried on and its general business conducted shall be in the city of Boston, county of Suffolk, and State of Massachusetts.

Third. The board of directors shall consist of from five to twelve stockholders, and the following persons—Leonard Whitney, Jr., Gideon P. Brown, Marcellus P. Springer, John H. Sanborn, Edw'd C. Huxley, Moses B. Tower, Edwin Ray, Edwin M. Fowle, J. Henry Whitaker, Arthur Sewall, George C. Rand, and Abner I. Benyon—are hereby appointed directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and qualified.

Fourth. The regular annual meetings of the stockholders for the election of directors shall be held at the banking house of this association on the second Tuesday of January of each year; but if no election shall be held on that day it may be held on any other day, according to the provisions of section 5149 of the Revised Statutes; and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with
20 the aforesaid provisions of the said section 5149 of the Revised Statutes.

Fifth. The capital stock of this association shall be two hundred and fifty thousand dollars, to be divided into shares of one hundred dollars each; but the capital may be increased according to the provisions of section 5142 of the Revised Statutes to any sum not

exceeding ten hundred thousand dollars; and in the case of the increase of capital of the association each stockholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors (a majority of whom shall be a quorum to do business) shall elect one of their number to be president of this association, who shall hold this office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director, and they shall have power to elect a vice-president, who shall also be a member of the board of directors, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association, to fix the salaries to be paid to them, and continue them in office or dismiss them, as in the opinion of a majority of the board the interests of the association may demand. They shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to provide for an increase of the capital of the association, and to regulate the manner in which such increase shall be made, and generally to do and perform all the acts that it may be legal for a board of directors to do under the Revised Statutes aforesaid; and they shall also have the power to make all by-laws that it may be proper and convenient for them to make under said Revised Statutes for the general regulation of the business of the association and the management and administration of its affairs, which by-laws may prohibit, if the directors shall so determine, the transfer of
21 stock owned by any stockholder who may be liable to this association, either as principal, debtor, or otherwise, without the consent of the board.

Seventh. This association shall continue for the period of twenty years from the date of the organization certificate, unless sooner dissolved by the act of its stockholders, owning at least two-thirds of its stock, who may dissolve and close up the association in such manner as they may deem to be for the interest of the stockholders and creditors of the association, but subject to the restrictions, requirements, and provisions of the Revised Statutes.

Eighth. These articles of the association may be changed or amended at any time by stockholders owning a majority of the stock of the association in any manner not inconsistent with the Revised Statutes, and the board of directors or any three stockholders may call a meeting of the stockholders for this purpose.

In witness whereof we have hereunto set our hands this tenth day of October, eighteen hundred and seventy-seven.

LEONARD WHITNEY, JR.
GIDEON P. BROWN.
MARCELLUS P. SPRINGER.
JOHN H. SANBORN.
EDWARD C. HUXLEY.
MOSES B. TOWER.
EDWIN RAY.
EDWIN M. FOWLE.
JAMES H. WHITAKER.
GEORGE C. RAND.
ARTHUR SEWALL.
ABNER I. BENYON.

EXHIBIT 2.

By-Laws of the Pacific National Bank.

Elections.

SECTION 1. The regular annual meeting of the stockholders of this bank for the election of directors shall be held at its banking house on the second Tuesday of January of each year between 22 the hours of 10 and 4. Fourteen days' notice of the time and object of said meeting shall be given by the cashier by publication in some newspaper published in Boston. At said meeting three judges of the election shall be appointed, who shall hold and conduct the same, and who shall, after the election has been held, certify under their hands to the cashier the result thereof and the names of the directors elect.

SEC. 2. The cashier, upon receiving the certificate of the judges of the election, as aforesaid, shall cause the same to be recorded upon the minute book of the bank, and shall notify the directors elect of their election and of the time at which to meet for the purpose of organizing the new board.

SEC. 3. If for any cause the annual election of directors should not be held on the day above named, the board shall order the election on some other day, of which special election notice shall be given, judges appointed, and returns made according to the requirements of sect's 1 and 2.

Officers.

SEC. 4. The officers of this bank shall be a president, cashier, teller, book-keeper, and such other officers as may be required for the prompt and orderly transaction of its business.

SEC. 5. The president shall hold his office, unless he shall resign or become disqualified, for the current year for which the board, of which he shall be a member, was elected. In case a vacancy shall occur in the board of directors during the current year it shall be filled by the board.

SEC. 6. The cashier and subordinate officers shall be appointed to hold their offices respectively during the pleasure of the board.

SEC. 7. The cashier shall be responsible for all moneys, funds, and valuables of the bank which may come into his possession, and shall give bonds, with security, to be approved by the board, in the penal sum of twenty thousand dollars ($20,000) conditioned for the faithful and honest discharge of his duties, and he will faithfully apply and account for all such moneys, funds, and valuables, and deliver the same, on proper demand, to the order of the directors of the boards, or to the person or persons authorized to receive
23 them.

SEC. 8. The teller shall be responsible for all such sums of money, property, and funds of every description as may from time to time come into his possession as teller, and shall give bonds, with satisfactory security, in the penalty of ten thousand dollars ($10,000) conditioned for the faithful and honest discharge of his duties as teller, and that he will faithfully appply, account for, and pay over all moneys, property, and funds of every description that may come into his hands by virtue of his office as teller to the order of the directors, or to such person or persons as may be authorized to demand and receive the same. The book-keeper and all other officers and clerks shall give bonds, with security, in such sums as the board may require.

Seal.

SEC. 9. The following is an impression of the seal adopted by the directors of this bank :

(IMPRESSION OF SEAL.)

Conveyance of real estate.

SEC. 10. All transfers and conveyances of real estate shall be made under the seal of the bank in accordance with the order of the board, and shall be signed by the president and cashier.

Increase of stock.

SEC. 11. Whenever an increase of stock shall be determined upon it shall be the duty of the board to notify all the stockholders of the same and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for, in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock.

24 Business of the bank.

SEC. 12. The bank shall be open for business at such hours as the directors shall determine of each day in the year excepting Sundays and legal holidays.

Minutes.

SEC. 13. The articles of association of this bank and the returns of the judges of the elections shall be recorded in the minute book and also the proceedings of the directors at all regular and special sessions. The minutes of all meetings shall be recorded by the cashier.

Transfers of stock.

SEC. 14. The stock of this bank shall be assignable only on the books of the bank, subject to the restrictions and provisions of the act, and a transfer book shall be kept, in which all assignments and transfers of stock shall be made.

SEC. 15. Certificates of stock signed by the president and cashier may be issued to stockholders, and the certificates shall state upon the face thereof that the stock is transferable only upon the books of the bank, and when stock is transferred the certificates thereof shall be returned and canceled from certificates issued.

Expenses.

SEC. 16. The current expenses shall be paid by the cashier, who shall cause the same to be entered upon a book kept for that purpose and open for inspection of the board at all times.

Contracts.

SEC. 17. All contracts, checks, drafts, certificates of deposit shall be signed by the president or cashier.

Examination.

SEC. 18. There shall be appointed by the board every six months, and one week at least previous to the declaration of a dividend, a committee, whose duty it shall be to examine the affairs of the bank, to count its cash and compare its assets and liabilities with the balances on the general ledger, for the purpose of ascertaining whether or not the books are correctly kept, and whether or not the bank is in a solvent condition and can properly pay a dividend. The result of said examination shall be reported to the board at the next regular meeting.

Meetings.

SEC. 19. The regular meetings of the board shall be held on such days as the directors may determine. Special meetings may be called by the president or cashier.

Quorums.

SEC. 20. A majority of the directors, including the president, shall be a quorum to do business.

SEC. 21. These by-laws may be changed or amended by a vote of two-thirds of the directors.

EXHIBIT 3.

TUESDAY, *Sept.* 13, 1881.

Present: Messrs. Benyon, Coleman, Dyer, Shepard, Cassidy, Whitaker, March, and Fowle.

Discounted notes per record 51, Nos. 139 to 168, were approved.

Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in an equal amount to that now held by them.

Attest: J. M. PETTENGILL, *Cashier.*

EXHIBIT 4.

A. I. Benyon, president. J. M. Pettingill, cashier.

PACIFIC NATIONAL BANK, 105 DEVONSHIRE STREET,
BOSTON, *Sept.* 13, 1881.

At a meeting of the directors of this bank, held this day, it was "Voted, That the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them."

26 Subscription to the new stock will be payable October 1st.

Parties desiring to anticipate payment will be allowed interest to that date at four per cent. per annum.

J. M. PETTINGILL, *Cashier.*

EXHIBIT 5.

Report of Bank Examiner to Comptroller, Nov. 18, 1881.

No. of bank, 2373.

Examiner's report of the condition of the "Pacific National Bank," located at Boston, in the county of Suffolk, State of Massachusetts, at 6 o'clock p. m., Nov. 18, 1881.

A. I. Benyon, president. J. M. Pettengill, cashier.

Resources:

			Dollars.	Cts.
1.	Notes and bills discounted		4,186,300	27
2.	Overdrafts		26,539	55
3.	U. S. bonds to secure circulation		500,000	00
4.	U. S. bonds to secure deposits			
5.	U. S. bonds on hand			
6.	Other stocks, bonds, and mortgages See general remarks.			
7.	Due from app'd reserve agents, viz.		273,500	00
8.	Due from other national banks		151,700	43
9.	Due from State banks and bankers		4,322	84
10.	Banking house	$		
11.	Other real estate			
12.	Furniture and fixtures			
13.	Current expenses	$22,232 73		
14.	Taxes paid	289 62		
			22,522	35

			Dollars.	Cts.
15.	Premiums paid		8,593	75
	Interest		38,431	54
27	16. Checks and other cash items		1,466,243	84
	17. Exch's for C. H., includ'g gold ch'ks			
18.	Bills of other national banks		9,694	00
19.	Bills of state banks			
20.	Fractional currency (includi'g nickels)			
21.	Specie, viz:			
	Silver coin	$3,049 68		
	Gold coin			
	Gold treasury notes			
			3,049	68
22.	Legal-tender notes			
23.	U. S. cert's of dep. for legal tenders			
24.	5 p. c. red'n fund with Treas. U. S.		13,500	00
25.	Other funds with Treas. U. S.			
	Cash short		5,311	19
	Total		6,709,709	44
	Liabilities:			
1.	Capital stock paid in		500,000	00
	New " "		461,370	00
2.	Surplus fund		74,142	82
3.	Discount	$65,135 67		
4.	Exchange			
5.	Interest			
6.	Premiums			
7.	Profit and loss	7,080 05		
			72,215	72
8.	Circulation received	$450,000 00		
	On hand and returned			
			450,000	00
9.	State bank circulation outstanding			
10.	Dividends unpaid		435	00
11.	Individual deposits, viz:			
	Subject to check	$1,062,540 10		
	Demand certif's	1,695,500 35		
	Time certificates			
	Certified checks			
	Cashier's checks			
			2,758,140	00
28	12. United States deposits			
	13. Deposits of U. S. disbursing officers			
14.	Due to national banks		1,473,240	18
15.	Due to State banks and bankers		137,695	18
16.	Notes and bills rediscounted		685,589	61
17.	Bills payable			
	Cash over		96,879	48
	Total		$6,709,709	44

Dividends and Surplus.

(Section 5109 of the Revised Statutes of the U. S.)

Date of last dividend, July 1, 1881; amount, $15,000; carried to surplus, $14,239.48.

Loans and Discounts.

On paper with two or more individual or firm names	$2,265,315	17
On single-name paper (one person or firm), without other security	301,518	35
On mortgages and other real estate security	252,659	17
On U. S. bonds payable on demand		
On other stocks, bonds, etc., payable on demand	1,366,807	58
All other loans		

Included in the above are—

Bad debts, as defined in section 5204 of the Revised Statutes of the U. S.		
Other suspended and over-due paper	371,095	87
Liabilities of directors (individual and firm) as payers	204,747	30

Loans exceeding the limit prescribed by section 5200 of the Revised Statutes of the U. S., viz:

N. M. Jewett, $100,000; Henry Waterman, $140,000; Geo. E. Horn, $100,000; Chicago, Burlington & Quincy R. R. bonds, $100,000; Katahdin railroad bonds, $99,500; T. C. Weeks, $192,850.

29 *General Remarks.*

Directors Pacific National Bank.

Leonard Whitney.	Geo. N. March.
E. M. Fowle.	Lewis Coleman.
Arthur Seward.	Edwin Ray.
John E Cassidy.	J. H. Whitaker.
M. P. Springer.	John Shepard.
J. H. Sanborn.	A. I. Benyon.

In my last examination of this bank I called especial attention to its manner of making loans by the issuing of certificates of deposit, and suggested that, in a financial crisis, such a system might be attended with peril. I also called attention to the names of parties who were borrowers, many of which were new to me, and to the character of collaterals, many of which I know nothing about.

During my examination, which continued through many days, at times entire days, and at times fragments of days, with examinations elsewhere carried on to a greater or less extent, I saw some of the directors, Mr. March and Mr. Whitney, more than any others, but to all that I saw I expressed anxiety for the welfare of the bank, on account of its loans based on its credit represented by certificates of deposit, and the peculiar character of many of its col-

laterals, about which I knew nothing, and urged the importance of a careful examination of the paper and securities of the bank and of the president's manner of doing business. The gentlemen that I saw all assured me that my urgently expressed requests should be complied with, and I felt comparatively easy, for I knew that my examination had been thorough, and, if the loans were good, the bank was in a healthy and prosperous condition.

The promises made, however, were never kept; and subsequently to the forwarding of my report to the comptroller, when I inquired of Mr. March, who is still one of the board of directors, if the examination by the directors had been made, he replied that it had not; that the directors met for the purpose of examination, and the president, being informed of the purpose of the meeting of the directors, "flew into a passion," and said, "If the directors cannot trust the thorough examination of Col. Needham, I will resign." Other conversations between a member or members of the board and the president was had on this matter, and the examination was abandoned. I replied to Mr. March in language substantially as follows: The responsibility of the bank is upon the directors, and they can never shield themselves by placing it upon the president.

Had the examination of the directors been made, the
30 character of the collaterals and the system of doing business by the president would have unquestionably been changed, and the result would have been different.

In reading the reply of the president to the letter of the Comptroller of Feb. 19th, I find that he promised to comply with the express wishes of the comptroller, but it was in promise alone that the compliance was made. A more reckless management than had ever before been conceived almost immediately after began. The credit of the bank was loaned to a greater and greater extent, and the ambition of the president seemed to be not so much security as how large he could swell his loans with a pledge of the borrower that the certificates of deposit on the money loaned should not be drawn for a period of time after the loan was affected.

For instance, in September, 1881, he loaned one hundred thousand dollars to Geo. E. Horn, of New York, and took as the only security a blank check signed by John Steward. This check has only the signature, no date, no amount, and might have been given for one thing or another, or, as far as I could see, might have been stolen from a check book. We have written to New York to make inquiry, but as yet have no reply.

Another instance: Oct. 7th 1881, N. M. Jewett borrowed the credit of this bank to the amount of eighty thousand dollars, and an acceptance of an item of real estate to the amount of twenty thousand dollars established an aggregate debit of one hundred thousand dollars. Where the item of real estate called twenty thousand came from, I am as yet unable to ascertain. The bank now shows to represent this hundred thousand dollars a mortgage of real estate in Boston, and, so far as I can see, the security was taken for an original debt, and is contrary to the statute.

One instance more will be enough to completely establish my

charge of reckless management. In October, 1881, the bank loaned its credit to Henry Waterman for one hundred thousand dollars, and took for security $143,800 of the stock of the Southern Maryland railroad, which has no market value, and is, at the best, a very doubtful matter.

Now, at these times, the bank was absolutely poor, had no money whatever to loan, and the only possible advantage it could get was the temporay use of the means which its credit thus loaned represented, the parties promising not to draw on the credit for two or three months. It seems almost impossible to believe that these and many other equally hazardous transactions were entered into without some ulterior and hidden motive on the part of the president, but I have in vain failed to find one.

The certificates of deposit, in a large number of instances, represent the legitimate deposits of money; many of these draw interest. How large a number are certificates representing credit only I am unable to determine, but evidently this amount is of great
31 magnitude. I enclose herewith paper marked "A," which will show the individual and total certificates issued.

In the same way, by the issuance of certificates under promise that the money should not be drawn for a period of time, although no such expression is indicated on the certificate, the bank has carried on, within the last eight months, an enormous real estate business, to wit:

Of the Home Savings Bank it has purchased real estate in Newton	10,000	
From the same bank, real estate in Boston	10,000	
From the same, another item of real state in Boston	4,500	
From the same, French's wharf	22,759	17
From the Mercantile Savings Institution, real estate in Boston	40,000	

These are all original and illegal transactions. The deeds of the first-named items bear date in Oct., 1881; of the third named, Apr. 4th, 1881; of the fourth, Oct. 12th, 1881, and of the fifth the date is Jan. 17th, 1881. I said to the president, in the presence of the directors, no such property was in this bank on the 31st of January, 1881, and he admitted, in all their presence, that the trade was not consummated until February, 1881, and that the deed was dated back. Most of this property is subject to mortgages, which the bank must carry if it continues to hold, and the bank holds nothing but the equities in its assets.

Together with the directors I have carefully gone over the call loan (so called), the aggregate amount of which, in round numbers, is sixteen hundred thousand dollars, and in marking off what might be considered doubtful, we have an aggregate of nearly one hundred thousand dollars, which would need time and care, and, if it came at all—and very likely a large portion of it might—would come very slowly.

This is independent of the one hundred thousand dollars of Horn,

to which I have heretofore alluded, and which has attached to it the blank check of John Steward.

In the discounts there appears the enormous aggregate of three hundred and seventy-one thousand and ninety-five $\frac{87}{100}$ "overdue."

This enormous amount has accumulated from about twenty thousand dollars, at the time of my January examination. I herewith send a detailed statement, marked "B." Many of these items have collateral, and are undoubtedly collectible, but a large amount will very likely be slow of collection.

The bank has lodged at the Central National Bank of Boston, collateral to secure loans amounting to	$238,502 55
At the Five-Cent Savings Bank	107,000
At Brown, Riley & Co.'s	10,000
At the Howard National Bank	115,000

32 to secure loans, which, with the exception of the loan at the Central National, have a margin which will undoubtedly be realized to apply to the unsecured liabilities of the bank.

At the Central National, independent of the indebtedness acknowledged by this bank, is a claim of two hundred and fifty thousand dollars, dollars, which this bank holds nothing to represent. This claim on the part of the Central has the *prima facie* evidence of the checks of this bank on the Eliot. There is no doubt but that Mr. Weeks owes this amount to somebody; he admits that; but there is no evidence that he owes it to the Pacific. How the Central National comes in possession of the checks of the Pacific, if it does not owe it that amount, has been a matter of protracted investigation by me.

I have reached the conclusion that the checks were temporarily loaned and not returned, or that they were given for a consideration, and the representative of that consideration has been mislaid or destroyed.

The prospect of litigation to establish this question is very good.

"Other stocks, bonds, and mortgages" I called attention to in my preliminary report, of which I desire this to be the concluding part. That there would be a large loss on these items if a forced sale was made there can be no doubt.

All of the bank balances have been verified, with the exception of those noted on the sheet which I herewith send, marked "C." I do not think the differences of unverified balances are of any considerable magnitude.

I herewith also send a sheet marked "D," which contains a full and complete list of the cash items as they appear in the bank. Many of these items are undoubtedly collectible, and no excuse but reckless negligence on the part of the president and cashier can explain their accumulation. The Weeks checks, which constitute the great bulk of the list, to wit:

Aug.	9th,	1881.	Check on Broadway National Bank, drawn by Weeks to the order of Day	10,000
"	19,	'81.	Drawn by Weeks to the order of Day	50,000
Sept.	3,	'81.	" "	25,000
Nov.	15,	'81.	" "	20,000
"	"	"	" "	25,000
"	"	"	" "	50,000
"	"	"	" "	50,000
"	"	"	Check of Nat'l Security Bank by Weeks to the order of Day	20,000
"	"	"	On North Nat. Bank by Weeks to the order of Day	75,000
"	"	"	On North Nat. Bank by Weeks to the order of Day	50,000
"	17,	"	On North Nat. Bank by Weeks to the order of Day	877,500
			Aggregating	1,262,500

33 [are] unsecured. No difficulty was experienced in passing Weeks' checks through the clearing house until Aug. 9th, 1881, when ten thousand dollars came back and was carried in cash items.

On Aug. 19th one of fifty thousand dollars came back and was placed in cash items. On the 15th day of October checks aggregating three hundred and fifteen thousand dollars came back, and this decided the temporary fate of the bank.

The check given on the seventeenth was a check in settlement, and, according to the books of this bank, represents the entire balance due from Weeks to this bank.

The transaction of taking checks of this bank on the Eliot National Bank, and paying in checks drawn on other national banks which went regularly through the clearing, had been prosecuted by Weeks, to a greater or less extent for a year. During this long time the transactions were made to balance every night. The transactions began in a comparatively small and, so far as I can see, in an apparently legitimate way. From time to time they grew until the aggregate reached well into a million a day.

In the earlier history of these transactions, and for a long time afterward, reaching into the early summer, many gentlemen believe that Mr. Weeks was perfectly solvent, and, had it not been for the crisis precipitated by the assassination of the president, his failure would not have occurred. Be this as it might, there can be no question as to the illegitimacy of these tranactions, out of which the Pacific National Bank never realized one single dollar. No motive, except to do an immense business, can be assigned for the strange conduct in allowing these transactions on the part of the president.

In looking over the assets and liabilities I consider the bank and its shareholders in a most precarious condition, and, unless Mr. Weeks can furnish the equivalent of at least five hundred thousand dollars in current funds and the stockholders pay in one million more, I would not consider even the possibility of reorganization.

I come now to the final consideration of this terrible catastrophe—terrible to the innocent depositors who may have the inconvenience of long delay and possible loss; terrible to the shareholders who must, in any event, for the time being, sink their entire capital; terrible for the directors, who had timely warning from the examiner and from the honorable Comptroller of the Currency with regard to the illegal and careless manner in which the president was conducting the business of the bank, and terrible for the business interests of society, which receives the shock of violated trust so detrimental to all its interests.

Bringing the first great fault to the door of the directors, who, when notice was given, should have persisted in a most rigid examination, I come to the cashier. In his custody were the funds of the bank. To him was submitted every item intended for the clearing.

He was a man of long experience. He was taken from a
34 neighboring bank, and the directors were influenced in his selection by his reputation of a careful and conservative man. No one knew better than he that clearing-house checks always represented cash. Out of his hands every day passed the checks that were given to Weeks, and it was for him to know whether or not he received an equivalent.

Could it be psssible that for months a business of drawing and balancing checks on the part of Mr. Weeks could have been continued from day to day and a man of long and varied experience, like the cashier of this bank, have no suspicion? If it is possible to imagine that, for the nine months of increasing business of this character, the cashier had no suspicion on the ninth day of August, 1881, when the first check of Mr. Weeks of ten thousand dollars came back, there could be excuse no longer; but even then no communication was made to a single member of the board of directors, and the drawing of checks and the acceptance of Weeks' checks as an equivalent went on.

On the 19th of August a check of $50,000 came back, but still not a word from the cashier, and on the third of September another of $25,000, but yet not a word, although these returned and dishonored checks were entered day after day in "cash items" by the teller. The transactions still continued without one word of disclosure being made to the directors from this trusted servant, who was receiving a large salary to guard the interests of the bank.

Confidence must begin somewhere; without confidence there can be no credit; without credit there can be no bank; without the bank there can be no extended business. The directors had the right to confide in their cashier, certainly to the extent that he would not accept in exchange for the funds of the bank in the form of a clearing-house check anything that was not the equivalent of money. The cashier cannot hide behind the president. He is an independent officer of the bank, and his duties are well and clearly defined. His trust has been violated, and the immediate cause of this disaster is chargeable to him.

The president of this bank must be next considered. He was made president of this bank when the fiery tongue of scandal was

pursuing him with relentless ardor. How has he returned the confidence so freely given? No one knew better than he what was and what was not legitimate banking. He knew, for the Comptroller of the Currency had told him, that loaning the credit of the bank was illegitimate and perilous business. He knew that making loans through the medium of certificates of deposit was more dangerous than making loans on legitimate deposits. He knew the transactions of buying real estate, loaning on real estate, loaning in excess of the limit, loaning by the hundreds of thousands of dollars on questionable security and in a careless manner were all blameworthy and reprehensible. He knew that securing the deposit of a life insurance company by taking out life policies on himself and son and charging the premium of $1,041.05 to the bank was unparalleled in the history of banking. He knew that buying old stone taken as debris from city houses and issuing certificates amounting to eleven thousand dollars therefor was monstrous and reckless. He knew that continuing to prosecute his business in a manner condemned by the comptroller, and without asking the directors to share with him in the responsibility, was high-handed and unjustifiable. There is no excuse for these two high, trusted, executive officers of the bank.

The matter is still under advisement whether the stockholders will make good the losses or the bank go into the hands of a receiver.

The principal part of the "cash over" in the statement forwarded as a preliminary report belonged in the loan account. The principal part of the discrepancy in the loan account was the result of our hurried manner in taking it, and is now mostly explained.

The real estate all appears in the call loans, and I have treated it under the head of "On mortgages and other real estate security."

The classification of the loan is the best I could give in the present condition of affairs, time collateral loans being treated with the two-named paper.

In "other suspended and overdue" I have classified all the overdue and bad debts, finding it difficult to determine how much of this amount should be treated as "bad debts." My own judgment is that a very considerable amount of the "other suspended and overdue" should strictly be treated that way.

The question has been raised as to whether the new stock is liable to assessment under the law, the increased capital not being all paid in. Can you give me information on this point, as it is very important in the reorganization?

Of illegal and illegitimate transactions not mentioned elsewhere in this report may be stated the following:

An agreement with Taunton Savings Bank to deliver a deed of fifteen houses on Madison Square, Boston	----	7,500
Four bonds of Nantasket Co.	4,000	
One bond Pleasant Valley & Utah	1,000	
Taken of stockholder to represent balance due on new stock of the bank and standing in the assets as	----	5,000

100 shares Pacific National Bank stock purchased for a customer, but no agreement by which the customer can be held ---- 10,400
Three notes of W. B. Worcester, 6,000 ---- 18,000

Worcester being a man whose responsibility and place of business are both unknown. In some form or other I have alluded to the most striking features of the loan account. In summing up the situation I have to say that on the 26th instant I made a statement of the condition of the bank to the directors. This statement
36 I preferred to put in writing, but as they objected to that, fearing it might reach the public and thus prejudice their case, I submitted it without manuscript. On the 29th, at the request of the directors, I made a statement to some forty gentlemen, composed of the directors and the largest stockholders of the bank, who had been invited in for consultation. This statement was also, at the request of the directors, made without manuscript, although, being made to a promiscuous body, it was much less complete than my first statement to the bank. At the adjournment of this meeting I was waited upon by a committee and presented with a letter, of which the following is a copy: Boston, Nov. 29th, 1881. Col. Daniel Needham, bank examiner. Dear Sir: At a meeting of the stockholders and directors of the Pacific National Bank held this day at the office of the association the following resolutions were adopted unanimously: Resolved, That the thanks of the directors, stockholders, and depositors of the Pacific National Bank are due, and are hereby tendered, to Col. Daniel Needham for his earnest efforts to ascertain the condition of the bank, as well as for the valuable suggestions he has made looking to its reorganization.—Signed, Lewis Coleman, chairman. I take the liberty to incorporate this communication into this report. The names of the directors, which will be found under the head of general remarks, are among the most honored names of Boston's business men, leaving out the name of A. I. Benyon. My view of the situation from the first has been of the most serious character. Much of the paper upon which reliance is placed to me looks doubtful, and I am yet to be convinced that the losses may not approximate seventeen hundred and fifty thousand dollars—possibly more. Although it must be admitted that the dishonored checks of Weeks precipitated this disaster, it is to me equally clear that the enormous issue of certificates as a matter of credit on illegal and questionable loans would have brought ruin in the end, and that the end could not be far off. In conclusion I can only say I have failed to find an explanation of these strange transactions, and, if not based upon criminality, must be explained by idiocy or insanity. I shall advise the Department immediately of the conclusion reached by directors.

DANIEL NEEDHAM, *Examiner.*

To the Comptroller of the Currency, Washington, D. C.

37 EXHIBIT 6.

OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *December* 13, 1881.

SIR: I had a conference with the committee who arrived here yesterday in reference to the affairs of the Pacific National Bank.

It is proposed to make an assessment for the full amount of the stock of the bank, and it is believed that when this is paid up the capital stock will be unimpaired and the bank in possession of abundant funds to meet all their obligations.

I request that you will, immediately on receipt of this letter, write me in reference to the present condition and prospects of the bank, and if you see any reason to doubt its ability to resume business, as proved.

Very respectfully, JNO. JAY KNOX,
Comptroller.

Daniel Needham, Esq., nat. bank examiner, 45 Milk street, Boston, Mass.

EXHIBIT 7.

OFFICE DANIEL NEEDHAM, NATIONAL BANK EXAMINER,
45 MILK STREET, BOSTON, *Dec. 14th*, 1881.

SIR: Your letter of the 13th is at hand.

In reply to your inquiry I will say: If Weeks will pay in on his unsecured loans five hundred thousand dollars, as has been proposed, and the arrangement with the Central National Bank with reference to the adjustment of the disputed claim is perfected and an obligation is given by the directors guaranteeing a certain amount of doubtful paper, which amount is stipulated in the resolution, a copy of which, after its passage, will be immediately forwarded to you by the board, then an assessment of one hundred per centum on the present capital of the bank, as it now stands on the books, would, in my judgment, make the bank solvent.

38 Many of the directors have the full confidence of the public, and, under the conditions I have specified above, I should have no doubt of the full ability of the bank to resume.

In speaking of the present capital upon which assessment must be made, I mean the old $500,000, together with the new $461,300, making subject to assessment $961,300. In my judgment it is most important that the bank should be revived if possible.

If it falls, the Central National must also fall, and the widespread injury could not be estimated.

I am gratified to say that the condition of the bank has been strengthened since it has been in my charge by the securing of some questionable debts, and careful management will undoubtedly save to the bank a large amount which would otherwise be lost.

If the bank goes on upon the plan now laid out, and which will be presented to you for approval within two or three days, and which embodies the features noted in this letter, then there must be a delay of some weeks, and I would like your approval to place my clerk in

charge during more or less of the temporary absence I may make in continuing my work of examinations elsewhere.

Very respectfully, DANIEL NEEDHAM,
Nat. Bank Examiner.

To Hon. John J. Knox, Comptroller of the Currency, Washington, D. C.

EXHIBIT 8.

Resolutions of Board of Directors, Dec. 14, 1881.

BOSTON, *Dec. 14th*, 1881.

At a meeting of the board of directors of the Pacific National Bank, held this day at the banking house, the following preamble and resolutions were unanimously adopted:

Whereas on the 18th day of November, 1881, it was discovered that the Pacific National Bank was unable to pay on demand its liabilities to depositors and creditors;

And whereas since the date named the directors, assisted
39 by Col. Daniel Needham, national bank examiner, and Wm. J. Best, have been engaged in an investigation to determine the liabilities and assets of said bank;

And whereas said investigation enables said directors to fix the apparent liabilities at $6,774,633.60 and the assets at the par or nominal value of $6,782,558.53, showing an apparent excess of assets over liabilities to the amount of $7,924.93;

And whereas said assets are not now worth their par or nominal value, but would probably realize in cash, with judicious management, $5,308,895.34, which would leave an apparent deficiency of $1,465,738.26;

And whereas, in the adjustment of the account of the Pacific National Bank with the Central National Bank, the latter has agreed, in the event of the reorganization of the Pacific National Bank, to yield of its alleged claims against the former the sum of $315,400, and has also agreed to return to the Pacific National Bank good assets of said bank now held by said Central National Bank as collateral to the amount of $55,252.55, thereby reducing the deficiency of the Pacific National Bank to $1,095,085.71;

And whereas, with such knowledge of the affairs of said Pacific National Bank as the directors have been able to obtain by diligent investigation and inquiry, they are of opinion that it should immediately be reorganized, in order fully to protect all of the interests involved;

And whereas the larger part of the assets of said bank consists of notes and bills discounted, of which a considerable portion could not now be converted into money without sacrificing the interests of the creditors of the association;

And whereas T. C. Weeks has returned to this bank $150,000 of its checks, and has agreed to return $350,000 of additional checks in a few days: Therefore,

Resolved, That, in the opinion of the directors of said bank, the

interests of both creditors and stockholders require its early reorganization.

Resolved, That the Comptroller of the Currency be requested to authorize the stockholders of the association to levy an assessment of 100% upon the par value of the capital stock now paid in, viz., $961,300, upon condition that said Weeks shall return to this bank $350,000 additional checks, as agreed, before said assessment shall be made.

Resolved, That, in the event said bank shall be reorganized and shall resume business with the approval of the Comptroller of the Currency, the board of directors will, and they do hereby, guarantee the payment of $133,785.71 out of the assets by them classed as "doubtful" and "bad," aggregating the sum of $1,473,663.19, and now treated by said directors as possessing no present money value, the condition of said guarantee being that it will cease and determine so soon and so far as the said sum of $133,785.71 shall have been realized from said "doubtful" and "bad" assets, and said directors shall be held only for so much of said sum of $133,785.71 as may not be realized from said "doubtful" and "bad" assets.

Resolved, That, in the opinion of said directors, said assessment upon the stock of said association and the said guarantee of $133,785.71 will place said association upon a sound financial basis; nevertheless, as time will be required to properly convert the assets of the association, which consist chiefly of notes and bills discounted, it is to the interest of the depositors and creditors to agree to a reasonable extension of time for the payment of their several claims. Recognizing this fact the Central National Bank has agreed to give an extension of one year from Jan. 1, 1882, on the whole amount of its claim as compromised, viz., $500,000, at 4% per annum.

Resolved, That a copy of these resolutions be forwarded to the Comptroller of the Currency and his approval asked of the scheme of reorganization herein set forth, and that he grant the directors until Jan. 15th, 1882, to perfect said scheme of reorganization.

A true copy.

(Signed) EDWIN W. FOWLE,
Sec'y pro tem.

EXHIBIT 9.

Stockholders' Meeting.

TUESDAY, *Jan.* 10, 1882—11 a. m.

The annual meeting of the stockholders of the Pacific National Bank was held at 11 o'clock this forenoon at the bank building on Devonshire street, about one hundred and fifty gentlemen being present. The meeting was called to order by the new president, Lewis Coleman, and J. H. Whittaker, of the board of directors, was chosen secretary. The records of the last meeting were read and approved.

President Coleman briefly alluded to the suspension of the bank Nov. 18, and to the circumstances which led to placing the books

and accounts of the bank in the hands of Col. Needham for examination. He then introduced the bank examiner, who presented the following report:

Col. Needham's report.

In accordance with the unanimous request of the directors of the Pacific National Bank I submit to you, somewhat in detail, the present condition of the bank and the history of the year which immediately precedes it.

41 On the 31st day of January last I came to the bank to make an official examination. I was welcomed by the president, and immediately commenced my work, taking the condition of the bank at the close of business that day. I continued the examination from day to day and time to time until its final conclusion—seeing, as I can now recall, only two of the directors besides the president, with whom I held conversation. To these gentlemen I spoke very freely of the character of the loans and the matter of issuing certificates, and urged the importance of a careful examination. In my report to the Government I called attention to what I considered defects and bad management, and, as a result of my report, the comptroller forwarded to the directors a communication, of which the following is a copy:

WASHINGTON, *Feb.* 19, 1881.

GENTLEMEN: The report of an examination of your bank, made on the 31st ult., has been received.

The report shows that the amount of funds in the bank available for reserve at the date of the examination was $196,385.17 less than the amount required by law. The deficiency is enormously large, and has, perhaps, been caused in part by the officers of the association considering and treating as available for reserve clearing-house gold certificates, which it holds to the amount of $195,000. The law, however (sec. 5192 United States Revised Statutes), provides that clearing-house certificates, representing specie or lawful money, specially deposited for the purpose of any clearing-house association, shall also be deemed to be lawful money in the possession of any association belonging to such clearing-house association, holding and owning such certificates within the preceding section; and, as your bank does not belong to the clearing-house association, the certificates referred to cannot be considered or counted as reserve. The examiner states that it would undoubtedly be for—

The interests of the other Boston banks,

as, of course, it will be for your own, to have your association admitted to the clearing-house, and it is hoped that some arrangement by which this can be accomplished will be devised and carried out. In the meantime, however, I must notify you that the reserve of the bank must be at once made good and kept so hereafter, paying due regard to the fact that the certificates above referred to cannot

be counted as any portion of the lawful money reserve of the association.

The liability of —— to the bank for money borrowed is reported as amounting to ——, and, if so, is excessive, contrary to law. Sec. 5200 United States Revised Statutes provides that the total liabilities to a national bank of any person, company, corporation, 42 or firm for money borrowed shall at no time exceed one-tenth part of its actual paid-in capital stock, and to this limit all accommodations granted by the bank should be confined. The indebtedness, if still excessive, must, without unnecessary delay, be reduced to at least the prescribed limit. It is stated in the report that ——, who is indorser upon the paper above mentioned, and also upon paper of ——, has himself borrowed —— from the bank. The examiner says that upon calling attention to the considerable amount loaned to parties, involving to a great extent the same interest, he was assured that the debt would be paid during the present month. I think that the accommodations of the bank should be more widely distributed.

The bank is reported to be liable to the amount of $898,812.99 upon demand certificates of deposit, of which certificates amounting to $503,500 are said to draw interest at the rate *at* from three to six per cent. With reference to the remainder of the certificates, which amount to $395,312.99, the examiner says: "Money is borrowed of —— by a pledge of discounted paper as collateral, and the said bank holds demand certificates to represent the amount. Loans are sometimes made by this

Issuing of demand certificates,

and parties securing loans in this way indorsed the certificates and pledge them as collateral, or, stipulating a time of payment for them, have them regularly discounted and thus raise money indirectly from other parties and banks. Of course such certificates do not bear interest, but the bank loans its credit, and in this way a very considerable amount of the demand certificates has been issued. I do not think this system could be classified as conservative banking. * * * In a time of general business embarrassment such a system of extended loaning might be attended with peril. There is no better established principle of law than that corporations can only lawfully exercise such powers as are specifically conferred upon them by their charters and such powers as are necessarily incidental to those granted. It has been decided by the courts that the incidental powers granted to national banks are not the incidental powers given generally to all banking institutions, but only such as are incidental to banks allowed to do such things as are prescribed by the statute, and that while a national bank has power to lend money upon personal security it has no power or authority to lend its credit.

See the case of J. & W. Seligman & Co. *v.* Charlottsville National Bank [and] of Johnston Bros. & Co. *v.* same bank, tried before the United States circuit court for the western district of Virginia during the fall term of 1878. The decision of the court will be found in the

December, 1879, number of the American Bankers' Magazine,
43 pages 465–469. The practice described by the examiner is irregular, and you are notified that it

Must be at once discontinued.

The amount of rediscounted paper reported—$416,312.57—is very large, and shows that the business of the association is too much extended. While the right of national banks in emergencies to obtain money by the rediscount of paper cannot be denied, they should not habitually do so, and it is hoped that the operations of your association will hereafter be confined to the use of the means legitimately at its command.

In this connection attention is called to the provisions of sec. 5202, United States Revised Statutes.

The examiner states that he criticised a large loan to ——, being fully satisfied that the security thereof, merchandise, could not be held under the paper in possession of the bank, and that he was assured that the matter would receive immediate attention. It should be properly arranged if it has not been before attended to.

Please let me hear fully from you in reply to this letter at an early day, and inform me what action will be taken with reference to the various matters herein brought to your notice.

Very respectfully,

(Signed) JNO. J. KNOX,
Comptroller.

To the directors of the Pacific National Bank, Boston, Mass.

This communication, together with the answer, was evidently read, in whole or in part, to the members of the board who were present at a subsequent meeting, Feb. 25. The following is a copy of the letter sent by the president

In reply:

FEB. 24, 1881.

Hon. John Jay Knox, Comptroller of the Currency, Washington, D. C.

SIR: Your letter of the 19th inst., with comments on report of Examiner Needham, is received and has our attention. We beg to reply to them *seriatim*. The clearing-house gold certificates reported as counted by us in reserve have been, for reasons disconnected with the permission or requirement of the law, largely converted into coin, and the balance will be. We were aware that the clause of the law underscored by you would, technically, not permit us to hold such a reserve, but have felt that we were complying with the spirit of the law, and so exempt from censure. We daily receive and pay large amounts in our dealings with other banks, and
44 so have adopted these certificates for the same reason that the other banks did, to save the risk and inconvenience incident to an almost continuous handling of coin. We will be excused for suggesting, also, as our exclusion from the clearing-house association is

purely the result of the malevolence of two or three men, who are, for the time being, in an official position, and in opposition to the wish of a considerable majority of that body, that it is unjust to us that a technical construction of the law should be made to bear upon us in a way never contemplated by the framers of the law. —— loans have been materially reduced, and before this reaches you will be still more so, and in a short time will be entirely paid.

The amount to the credit of certificates of deposit is made up mostly of amounts deposited by individuals, firms, and corporations, who, having no regular account with us, preferred to receive our certificates in place of a pass-book showing the transaction. The amount held by the * * * was so placed by mutual agreement between * * * and the writer, believing this to be

A more legitimate way

than that usually adopted, of one bank drawing upon another, and so making it appear as a bank deposit, which it really was not. We were confirmed in the propriety of this mode by the fact that it is the one in vogue by the New York banks.

In regard to "loaning our credit," we have to say that never in a single instance has any stipulation been made by us in regard to any certificate issued to any party. They are issued in regular form, and are payable at any moment on presentation. When in any case such certificates have been held it has been by those whose account would not entitle them to loans, and they have taken this mode of making their business of value to the bank.

In regard to rediscounts our position is this: We have a large and active list of depositors, and have, almost continually, more paper offered than we can do. This is well known to quite a number of our banks, who, in consequence of an inactive list of depositors, have more money than paper, and solicit of us a transfer of some of our loan. In a large majority of instances "rediscounts" are not of our seeking. In an experience of thirty years it has seemed to the writer that this is a more conservative method than the one largely in vogue among banks in this city, of borrowing daily, and in some cases oftener, such sums as their neighbors may have to spare for the moment, with a liability to be called on for repayment at a moment's notice. * * * In regard to loan of ——, fresh merchandise has been substituted for that withdrawn, and the loan, which would be considered good without any collateral, is now complete.

45 Permit us to add that in many years of banking experience in this city our views in regard to modes and methods have been fully commented upon, and in consequence have received in some cases ridicule and in many more commendation for our conservatism, which goes to show, to our mind, that conservatism is a relative term, and that which would be considered rashness in some cases and under some circumstances would, under a different condition, be the extreme of conservatism.

I remain, your ob't servant,

(Signed) A. I. BENYON, *Pres't.*

I am assured that this communication, which was interpreted by the members of the board who heard it as a promise that all the evils complained of

Should be at once rectified,

was considered sufficient, and, with a confidence in the light of present developments not easily understood, was accepted as answering all necessary action on the part of the directors, although a proposition to examine the bank by one or more of the directors was subsequently made, which, for reasons at the time given by the president, was abandoned.

On the evening of the 18th of November, after the suspension of the bank, I came into it. I found the bank in great disorder. The books had not been made up for nearly a month, and my first labor was directed to the making up of the books and ascertaining a statement of the condition of the bank from the books.

Having secured this I commenced a careful examination of the assets. In this from the first I have had the hearty and earnest cooperation of the board of directors, many of them, although they have a large business of their own, having devoted their entire time to aid in saving and securing every possible asset.

The cause of the disaster to the bank is easily discovered. It comes from and is alone based upon loaning its credit in various ways and to a remarkable extent.

Its credit has been loaned in five ways, two of which are not unusual.

1st. There have been large rediscounts of paper. The rediscounts on the 31st of January, 1881, at the time of my last examination previous to the suspension, amounted to $416,343.57; at the time of suspension, Nov. 18, 1881, they amounted to $685,579.61, an increase in the nine months and a half of $269,246.04. In rediscounting paper the bank is supposed to secure one great advantage, and that is interest to an extent on a certain amount of funds which it

46 Possesses only in its credit.

For instance, if paper was discounted at eight per centum and rediscounted at six per centum the bank would be the gainer on the line of rediscounts outstanding Nov. 18, 1881, of $13,711. But it must be remembered that the bank takes a liability on the payment of every dollar of its rediscounts.

It is generally inferred that the rediscounted paper of any bank is among the best and most legitimate business paper, and the indorsement of the bank rediscounting secures it to such an extent that it will pass current at rates of interest much below the best market rates of money on ordinary business paper.

This temptation has unquestionably been one which has resulted in very considerable disaster, a large amount of rediscounted paper already having gone to protest.

The second form in which the credit of the bank has been loaned has been in borrowing money on discounted paper and guaranteeing

the paper. This amount involves the same risk to the bank as the rediscounts, and the gain to the bank by this process is in the same way—loaning at a high or fair rate of interest and borrowing at a reduced rate by guaranteeing the payment of the paper. The amount guaranteed in this way outstanding Nov. 18, 1881, was $200,000.

A third process of loaning the credit of the bank has been to arrange, in case a loan is allowed, that a certain amount shall remain on deposit for a greater or less length of time, thus securing for the bank the same amount of earnings the bank would secure if it had ready money to loan to its customers. This is not a novel feature in banking, but when practised to an abnormal extent involves risks which, as in the case of the bank, is

An item of more or less peril.

A fourth process of loaning the credit of the bank has been by the issuing of certificates of deposits. On the 31st of January, 1881, the certificates outstanding amounted to $931,975.17, and on the 18th of November, when the bank stopped, they aggregated $1,698,-916.53. The advantages supposed to be secured by the bank by this process were very great.

Parties taking certificates, with the personal promise to hold them a length of time, could unquestionably get loans, when they would have had no chance of securing loans if the money had been paid directly from the cash. The temptation to make loans by thus securing as available cash the credit of the bank on its certificate was too great to be resisted, and although such loans, had they been good, would have resulted in enormous profits, as they stand in the light to-day, they promised large amounts of poorly-secured paper,
47 upon which greater losses may safely be calculated. Enormous amounts were loaned by this process in the few months immediately preceding the suspension of the bank, and loans of $100,000 at a time, on most questionable, if not absolutely illegal, collateral, and in violation of law, were made in several instances, and this, too, when the bank had no funds to loan.

The fifth process of loaning on credit of the bank, and which brought about a sudden ruin, was the issuing of checks on its Boston and New York correspondents without receiving an equivalent in bankable funds. The practice undoubtedly grew from a small beginning, but

Culminated in an enormous aggregate.

The process was this: The party most largely in interest would send in a memorandum in the morning of such checks on New York or Boston as might be needed for his day's business; then checks would be drawn by the cashier of the Pacific National, under the general direction of the president, and, after being regularly entered, would be given to the party in waiting in exchange for his simple memorandum. These checks would frequently amount to hundreds of thousands of dollars, and how it was that the cashier could pursue

this line of illegitimate business for weeks and months and have no suspicion that there was something wrong it is impossible for me to determine. But such, he assures me, was the fact.

During the entire business hours of the day nothing but an unsigned memorandum represented the hundreds of thousands of dollars which this bank in the morning of each day drew on its correspondents. At the close of business the party receiving this accommodation brought to the bank clearing-house funds to cancel the morning obligations. These New York and Boston funds passed regularly through the clearing house until Aug. 9, 1881, at which time a check of $10,000 was held back. Up to this time it would have been difficult, if not impossible, for the directors to discover any illegitimacy in this proceeding. Clearing-house checks are always supposed to be cash, and up to the ninth day of August, 1881, every clearing-house check was regularly and promptly paid, so that taking the cash at night or in the morning would not necessarily have revealed any abnormal condition. Aug. 19 a check of $50,000 was held back, and on Sept. 3 one of $25,000. Out of this management, although the bank was in daily peril by its thus loaning its credit and its funds, the bank never realized one single dollar of advantage.

When questioned with regard to the matter the only reply which could be obtained was that it was done

To swell the volume of business.

Confidence must begin somewhere. In addition to that re-
48 posed in the president, the directors had a cashier taken from a neighboring bank, of good repute among those who had known him long and well. Upon him they relied for the management of the cash, and to him all these facts should have been known; but he, regarding the president as the supreme power, did not stop to criticise any act which he directed, and, therefore, in his mind no suspicion of illegitimacy entered. On the eighteenth day of November, when the final crash came, the sum total of these checks, against which there was only the name of one man, aggregated $1,262,500.

Thus, in brief, has been recited the history and culmination of this sad catastrophe. The solution of these strange acts can find thus far no sufficient explanation. This is not the time or place for charges or criminations. The disaster is upon us, and the business of the hour is to meet it. There are but two ways: one is to allow the bank to pass into the hands of a receiver, in which case one hundred per centum will unquestionably be demanded of the stockholders to meet the deficit; the other is to vote an assessment of one hundred per centum, nurse the poor and doubtful debts, of which there are approximately $1,500,000, and thus realize the largest amount from the invested assets.

The detail of losses will be given by the counsel of the board of directors, W. J. Best, who has given unremitting labor to the investigation, and upon whose figures full reliance can be placed.

DANIEL NEEDHAM,

National Bank Examiner in charge of Pacific National Bank.

Address of W. J. Best.

I wish, gentlemen, that we met under pleasanter auspices than those in which we assemble here to-day. It is always an unpleasant task to a man to tell another that disaster has overtaken him. The story, however, must be told by some one. You have had a statement, full and complete, of the transactions which culminated in the suspension of the Pacific National Bank on Nov. 18, 1881. There is nothing to be added to the facts furnished in that regard by Col. Needham. What remains for me to say is simply to tell what there is in this bank with which to meet its liabilities to depositors and creditors. In ascertaining the liabilities it was necessary to have recourse to the books of account. Col. Needham has informed you that the books had not been balanced for a considerable period prior to Nov. 18, 1881. The liabilities, however, have been ascertained with the utmost care, and when I give you the amount I think you may accept it as absolutely correct. As to the assets of the bank, I deemed it unwise to use the books of account. All that I looked to was the notes and bills discounted and such stocks and bonds as were to be found in the vaults. I have handled, I believe, every note in the
49 bank, have examined it both as to its form and value, and have taken such measures as were possible, and seemed to me necessary, to ascertain its actual value, a reasonable time being allowed to convert the assets.

The nominal value of the assets, divested of every questionable item, is $5,764,613.47, and the actual appraised value $5,049,758.82. I have reached these conclusions after blotting out more than $750,000 of claims against one man in this city, and treating as an asset only the sum which we know will be paid in probably to-day, but certainly within the next forty-eight hours.

The liabilities consist of three classes. First, there is a liability upon circulation; second, to depositors and creditors, which includes open accounts, demand certificates, rediscounts, and loans by banks and bankers to the Pacific. The whole amount of the liabilities under the second head is $5,154,592.21; the liability to stockholders is $961,300, and upon circulation $450,000, making a total of $6,565,892.21. Deducting the estimated value of the assets from the liabilities, we find an

Apparent deficiency

of $1,516,133.39. I say "apparent" because a very considerable portion of the sum named we can offset by exchanging securities and discounted paper, classed by us as "doubtful," and which do not appear in the estimated value of the estate of the bank, for demand certificates and cashier's checks now outstanding. I have traced many of these transactions, I think a majority of them, and have come to the conclusion that we may safely assume to exchange the doubtful assets for the obligations of the bank, about $370,000, which would go to reduce the deficiency. As to the remainder of that deficiency, I have proposed to the directors that it shall be met by first levying, voluntarily, upon the stock an assessment of one hundred per

cent.; second, by their either putting in cash or good security for $150,000, in addition to the assessment upon the stock which they hold. This sum of $150,000 is to be repaid out of the remainder of the doubtful assets as soon as collected, and, if not collected, then they (the directors) will have put in $150,000 of their own funds to enable the bank to resume upon a sound financial basis. There is also a credit of some $35,000 as margins upon loans standing in the name of individuals through whom the late management of this bank borrowed money, the collateral of the bank being pledged as security for its payment. These loans could have been retired long since with funds collected since the date of suspension, but no transaction of that nature could be permitted by the national bank examiner. As soon, however, as the bank resumes there can be put into its treasury from $35,000 to $40,000, which stands in the form in which I have just stated.

50 Independently of the assets, which we consider doubtful, there is about $750,000 of a claim, as already intimated, which we take no notice of whatever, and which some of the best-informed men in Boston say is likely to yield a very considerable amount to the bank. The person concerned says it will all be paid as soon as he can get on his feet and be able to

Readjust his own affairs

and control his estate. There is in it sufficient to pay his entire indebtedness. But that is a mere promise, and would not serve as a basis to determine the amount of money necessary to be put into this bank to enable it to resume.

After the most careful and painstaking examination of all the bank's affairs, and having, as already explained, examined the accounts themselves, rather than take the record from the books, I have come to the conclusion that, with the assessment which it is proposed by the Comptroller of the Currency you shall to-day order upon the stock of the bank, and the guarantee fund to be furnished by the directors, there is for this bank a very bright future. Of course much depends upon the management, and that it will be proper and correct I do not doubt. During the eight weeks I have been here my efforts have been seconded most earnestly, literally day and night, by the directors, and the work which they have done in connection with myself has, to my certain knowledge, strengthened the assets of the bank to the extent of more than $500,000, as compared with their condition on the night of the 18th of November, 1881; that is to say, promises of individuals and corporations to which there is no collateral, the promise being of little or no value, have been strengthened by guarantees or indorsements, or by the putting in of good collateral, in the sum of $500,000. There are other ways in which the directors have greatly improved the condition of the bank; and if their plans should meet with your approval, as they have had the hearty approval and indorsement of the Comptroller of the Currency, I repeat the remark of a minute ago, that I see no reason why this bank may not in a short time resume business in a condition which can hardly fail to make the

assessment now necessary to that end not only a safe and profitable investment, but insure beyond a peradventure a realization of perhaps 25, and maybe 50, cents on $1 of the money which has now passed beyond your control, and a dollar of which it would be impossible for you ever to get back were the bank to pass into the hands of a receiver.

In this connection, as an evidence to you that everything has been done, thus far, that was possible

51 To secure the interests

not only of the depositors and creditors, but also of the stockholders, I should state that there has been placed in my name as trustee for the Pacific Bank real and personal property which recently stood in the name of Mr. Benyon and members of his family, worth in cash, I think, $100,000. This, of course, will go as soon as it can be realized upon to help make good this great breach in your assets. I believe there are other properties, of what amount I have no knowledge at present, that we may get in the same way from persons who have had dealings with the bank, but the claims against whom we have written off now, it seeming unwise to regard them as worth anything.

There is nothing further, gentlemen, that I wish to say to you, but I shall try to answer any question you may desire to ask. I show you now (lifting a large pile of statements) the result of my investigation—the notes that I have made—and I can assure you that everything that is in this bank has been thoroughly sifted.

Queries.

A STOCKHOLDER: Do you know how the bank stood when the directors voted to double its capital?

Mr. BEST: I am not able to answer that question. I had no connection with the bank until about the 28th of November, ten days after the failure. My only relation previous to that time was that of its largest depositor. The money now here in my own name and in the name of a corporation of which I am president amounts to about $260,000 or $270,000.

Q. Over what period does this indebtedness run?

Mr. BEST: I think some losses of the bank originated in transactions made several months previous to the vote for increasing the stock. But the transactions have been fully described by Col. Needham. They were carried not upon the books of the bank, but in the head of its president and in the memorandum which the cashier himself kept. There is not an entry upon any of the books of the association of $1,262,500 indebtedness which stood in the name of one of its debtors on Nov. 18.

Q. But in the paper which the bank held, in your examination, of course, you had to see the date upon that paper, and you know, consequently, about what dates or for what dates the bank took that paper. Have you any doubt that this bank was insolvent at the time it voted for the increase of its capital stock?

Mr. BEST: That is a question I cannot answer. I have only addressed myself to ascertaining the bank's condition on the 18th of November.

52 Q. That question has not, then, been looked into by you at all?

Mr. BEST: No, sir; I have only addressed myself to the one date, Nov. 18.

ANOTHER STOCKHOLDER: I understand many small stockholders are not able to meet this assessment. What is to become of them?

Mr. BEST: I am at a loss to know how to answer that question. I am not, myself, a stockholder, but should the bank go on I am likely to be. The law prescribes that when an assessment is ordered three months shall be given within which to make payment. If payment shall not be made then the law provides that a notice of thirty days shall be given, and, unless payment be made at the expiration of that time, the stock would then be sold. I think, however, there are but few who will not be able to take care of the assessment, and I am hopeful—my hope being based upon such knowledge as I have been able to glean by my labors here—that before any of these small holders could be sold out the affairs of the bank will be in such condition that they can themselves raise the money for the assessment without difficulty.

Q. I desire to know whether the cashier has not given a bond, and, if so, for how much, and whether his securities are good.

Mr. BEST: It was intended that the cashier should have given a bond (laughter), and I have reason to believe that a bond was drawn and that the directors were of the opinion that it was executed; but, since the suspension, it has been found that the bond was not executed. The cashier, therefore, cannot be held responsible in any sum whatever on that account.

Q. What provisions are there in the organization of the bank under the original charter or articles of association for an increase in its capital?

Mr. BEST: Perhaps it would be better for the counsel of the bank to answer that question, as I am only a merchant. The articles of association must conform to the law, and the law, I believe, is explicit upon that point. The counsel of the bank, Mr. Stone, could make that matter much plainer than myself.

A stockholder called for the reading of the provision of the articles of association

For increasing the capital stock,

and Mr. Stone, the counsel for the directors, read from the fifth article that the capital should be $250,000, but may be increased, according to the provisions of sec. 5142 of the Revised Statutes, to any sum not exceeding $1,000,000; also sec. 11 of the by-laws, providing that whenever an increase of the stock shall be determined upon the directors shall notify all the stockholders, cause a subscription book to be opened, and, if any stockholder fails to subscribe

53 the directors shall determine what disposition shall be made of the remaining new stock unsubscribed for, and from the di-

rectors' records to show that $461,300 of new stock was subscribed for, represented either by certificates of stock actually issued or in receipts, on the surrender of which the parties who took them are entitled to their certificates, and the remaining $38,700 unsubscribed was canceled; that the Comptroller of the Currency was notified and had issued his certificate that the increase of capital stock had been made according to law, which paper was read by Mr. Stone.

The call of the comptroller for an assessment of one hundred per cent. on the capital stock was read, and the following was offered:

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent. upon the shareholders of the Pacific National Bank, of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith.

J. H. Benton, Jr., called for a stock vote upon the question.

A running discussion

ensued upon the expediency of passing the vote. Mr. McIntire, of East Cambridge, holding two shares, said it was a legal question whether the old stockholders could be assessed under the call. He wanted action postponed and a committee appointed to examine the accounts and report. He wanted to know whether the bank was solvent when he was induced to buy his stock. Later, when the roll was being taken, Mr. McIntire retired from the room, protesting against and declining to take part in the proceedings.

Mr. Hodges also thought the question should be settled whether the old stockholders could be assessed, and favored postponement.

Mr. Dole spoke in the same vein.

Several gentlemen spoke in favor of immediate action, among them J. F. C. Hyde, of Newton; Col. Alden, Capt. Watts, of Maine, and Henry D. Hyde, all agreeing that the only thing to be done was to vote and order the assessment, as the beast means of getting out of the difficulty and saving what they had invested.

In reply to the objections of Messrs. McIntire and Hodges, Mr. Stone stated that the assessment had been ordered by the comptroller under the best authority at Washington, and its legality would have to be settled in the courts.

There were loud calls for "question," and some impatience manifested at the delay.

The stock vote was ordered, and the chair appointed J. H. Benton, Jr., Capt. Watts, Richard Stone, Jr., J. F. C. Hyde, and Dwight Chester a committee to collect and count votes. The ballot proceeded.

54 The assessment ordered.

The question of ordering the one hundred per cent. assessment

upon all outstanding stock was carried by a practically unanimous vote.

The total vote represented some $600,000, out of which only about $10,000 was opposed to ordering the assessment.

Directors elected.

The following directors were chosen by a stock vote of 4,727 shares against eighty scattering votes:

Lewis Coleman, of Boston; John Shepard, of Boston; M. Dyer, Jr., of Boston; M. P. Springer, of Newton; J. H. Whitaker, of Malden; Edwin Ray, of Newton; J. H. Sanborn, of Newton; E. M. Fowle, of Newton; George H. March, of Watertown; Arthur Sewall, of Bath; John E. Cassidy, of Boston; John Fallon, of Lawrence.

Present condition of the bank.

The following statement of the bank's condition Jan. 10, 1882, was submitted:

	Par value.	Estimated value.
Cash	$12,743 68	$12,743 68
U. S. bonds to secure circulation	500,000 00	500,000 00
Redemption fund	13,500 00	13,500 00
From banks and bankers	196,049 93	196,049 93
Bonds, mortgages, and stocks	273,500 00	249,000 00
Pledged to International Trust Company on account of $200,000 loan, not included under any other head	50,000 00	50,000 00
Cashier's account and cash items	145,038 90	93,250 49
Receiving teller's items	57,743 02	49,558 22
Notes and bills discounted, etc., including real estate mortgages and stocks carried as loans	4,353,538 40	3,739,656 50
Overdrafts	26,539 55	10,000 00
Revenue stamps	1,000 00	1,000 00
T. C. Weeks, cash	135,000 00	135,000 00
Difference between estimated and par value		714,894 65
	$5,764,653 47	$5,764,653 47
Circulation		450,000 00
55 Deposits and creditors:		
A—Deposits subject to check	$1,060,615 10	
B—Certificates of deposit	1,728,762 53	
C—Due banks and bankers	1,679,189 97	
D—Rediscounts	685,589 61	
E—Unpaid dividends	435 00	
		$5,154,592 21
Stockholders		961,300 00
		$6,565,892 21

Recapitulation:

	Par value.	Estimated value.
Assets—Estimated value, as above		$5,049,758 82
Liabilities		6,565,892 21
Apparent deficiency		$1,516,133 39
Margin on loans in names of individuals	$25,000 00	
Premium on U. S. bonds, about	10,000 00	
Assessment	961,300 00	
Directors' guarantee fund	150,000 00	
Doubtful assets ($714,894.65)	369,833 39	
		$1,516,133 39

The committee appointed to receive, sort, count, and report the votes cast upon the motion to adopt the resolution offered by Richard Stone, Jr., providing for an assessment upon the capital stock, have attended to that duty, and report as follows, viz: Whole number of votes cast, 5,549, representing 5,549 shares, of which 5,494 are in the affirmative and 55 in the negative.

(Signed) J. H. BENTON, JR.
DWIGHT CHESTER.
RICHARD STONE, JR.
SAMUEL WATTS.
JAMES F. C. HYDE.

Adjourned.

J. H. WHITAKER, *Secretary.*

56 EXHIBIT 10.

Record of Directors' Meeting.

SATURDAY, *Nov.* 19, 1881.

Present: Messrs. Benyon, Coleman, Sewall, Sanborn, Springer, Shepard, March, Whitaker and Fowle.

Voted, That Col. Needham be requested to make a thorough examination of the bank, and report to the directors.

Voted, That Messrs. Coleman, Shepard, and Whitaker be an executive committee to aid the bank examiner in the examination of the security of the bank, with full power.

Attest: J. M. PETTENGILL, *Cashier.*

EXHIBIT 11.

Letter, Bank Examiner to Comptroller, Nov. 26, 1881.

OFFICE OF DANIEL NEEDHAM, NATIONAL BANK EXAMINER,
45 MILK STREET, BOSTON, *Nov.* 26, 1881.

SIR: I have made a statement to the directors of the Pacific National Bank of Boston this afternoon. All the directors but one were present.

They have taken the matter of my statement under consideration, and are anxious for a delay of a week, and have telegraphed to the comptroller asking delay in his final decision.

My report to the Department will be made up at the earliest moment, but I fear it cannot be completed before Monday evening or Tuesday forenoon of next week.

I do not think my investigation of yesterday and to-day has made the matter more hopeful. The directors, however, are very hopeful, and I hope they may have full opportunity for deliberation.

I was in error in my statement that Mr. Weeks was not using checks of the Pacific one year ago, or at the time of my last examination. I made the statement from the testimony of Benyon, the president, which was confirmed by Weeks; they, however, stated from memory. I find by examination of the stub-books that Weeks was using Pacific National Bank checks at the time of my last examination and for some two months previously, but in comparatively small amounts; and the checks which were in at the time of my examination were all apparently regular clearing checks and
57 passed regularly and in amount not sufficient to attract any attention. At that time Mr. Weeks was unquestionably solvent, and continued so for several months afterwards; and the first clearing check which came back to the Pacific was the 9th of August, 1881, for the sum of ten thousand dollars.

I shall give full details of transactions and minute account of the condition of the bank in my report.

Very respectfully, y'r ob't s'v't,

DANIEL NEEDHAM.

Hon. John Jay Knox, Comptroller of the Currency, Washington, D. C.

EXHIBIT 12.

Report of Bank Examiner to Comptroller, March 11, 1882.

No. of bank, 2373.

Examiner's report of the condition of the Pacific "National Bank," located at Boston, in the county of Suffolk, State of Massachusetts, at 9 o'clock a. m., March 11th, 1882.

Lewis Coleman, president; E. C. Whitney, cashier.

Resources:

	Dollars.	Cts.
1. Notes and bills discounted	$2,436,962	64
2. Overdrafts	2,184	89
3. U. S. bonds to secure circulation	500,000	
4. U. S. bonds to secure deposits		
5. U. S. bonds on hand		
6. Other stocks, bonds, and mortgages	664,672	46
Temporary or demand loan	702,854	06
7. Due from app'd reserve agents, viz.	845,202	12
Suspense account due on assessment	354,300	
8. Due from other national banks	36,545	74

		Dollars.	Cts.
9.	Due from State banks and bankers		
10.	Banking house		
11.	Other real estate	335,041	88
12.	Furniture and fixtures		
	13. Current expenses		
58	14. Taxes paid		
	15. Premiums paid		
	Revenue stamps	961	93
16.	Checks and other cash items	91,141	80
17.	Exch's for C. H., includ'g gold ch'ks		
18.	Bills of other national banks		
19.	Bills of State banks		
20.	Fractional currency (includi'g nickles)		
21.	Specie, viz.:		
	Silver coin	3,049	68
	Gold coin		
	Rec. teller	3,876	62
22.	Legal-tender notes		
23.	U. S. cert's of dep. for legal tenders		
24.	5 p. c. red'n fund with Treas. U. S.	22,500	
25.	Other funds with Treas. U. S.		
	Cash		
	Total	5,999,293	82

Liabilities:

1.	Capital stock paid in		354,300	
	Do. assessment		607,000	
2.	Surplus fund		300,000	
3.	Discount			
4.	Exchange			
5.	Interest			
6.	Premiums			
7.	Profit and loss		18,291	44
	Suspense Poland		9,800	
8.	Circulation received	$450,000		
	On hand and returned	43,400		
			406,600	
9.	State bank circulation outstanding			
	Suspense certificates		367,483	34
	10. Dividends unpaid		435	
59	11. Individual deposits, viz:			
	Subject to check		986,380	67
	Demand certif's		1,108,458	28
	Time certificates			
	Certified checks			
	Cashier's checks			
12.	United States deposits			
13.	Deposits of U. S. disbursing officers			
14.	Due to national banks		929,817	51

	Dollars.	Cts.
15. Due to State banks and bankers		
16. Notes and bills rediscounted	382,895	99
17. Bills payable	509,701	32
Cash over	18,130	27
Total	$5,999,293	82

Dividends and Surplus.

(Section 5199 of the Revised Statutes of the U. S.)

Date of last dividend, July 1, '81; amount, $15,000; carried to surplus, $14,239.48.

Loans and Discounts.

On paper with two or more individual or firm names	$1,733,836	98
On single-name paper (one person or firm) without other security	162,770	85
On mortgages and other real estate security		
On U. S. bonds, payable on demand		
On other stocks, bonds, etc., payable on demand	762,708	88
All other loans	480,499	99

Included in the above are—

Bad debts, as defined in section 5204 of the Revised Statutes of the U. S.	3,612	84
Other suspended and overdue paper	777,619	84
Liabilities of directors (individual and firm) as payers	101,607	33

60 Loans exceeding the limit prescribed by section 5200 of the Revised Statutes of the U. S., viz:

Consist of two items, to wit:

John Steward	$100,000
H. M. Jewett	100,000

General Remarks.

Bills payable consist of memoranda given to the Central National Bank, to wit:

$19,701.32, payable six months from January 1st, 1882.

$400,000, payable one year from January 1st, 1882, at four per cent. interest.

$70,000 at the Boston Five-Cent Savings Bank, at five per cent. interest, with bonds as collateral, payable at the option of the bank.

The checks drawn on the Eliot and held by the Central National, aggregating three hundred and fifty thousand dollars, upon one of which T. C. Weeks has paid twenty-five thousand dollars, and which were treated by me in a former report as doubtful, and which I had not expected to come to the bank from the Central National, were accepted through Mr. Weeks, in his settlement, as is fully explained

in my correspondence with the directors, a copy of which is embraced in this report.

Bank accounts all verified in accordance with the requirements of the Department.

Cash items consist of the following, to wit:

Fractional bill and currency	1	60
Memorandum for interest due from Edward Crane *for interest*	2,797	08
Memorandum for check, W. J. Best	2,500	
Memorandum checks, E. M. Fowle	2,875	03
Memorandum check, F. E. Bryant	241	73
Cash check, Lewis Coleman	19,300	
Cash check, Shepard, Norwell & Co.	19,000	
" " Lewis Coleman	10,000	
Check on Do.	968	50
61 " " Pacific Nat'l Bank, W. S. Denney, treas.	7,000	
Check good on opening, J. V. Fletcher & Co.	10,000	
Check good on opening, C. E. Morrison	5,000	
" Cash, Lewis Coleman	1,000	
" " Do.	100	
" " Do.	5,000	
Cash paid on W. P. H. note, Wm. P. Hunt	5,109	17
Bills	245	
Change	3	69
	91,141	80

Memorandum checks are said by the president to be good.

Cash paid on W. P. Hunt's note, 5,109.17, will be carried to loan account, the note having been endorsed by the Pacific National Bank, and the party holding the same having been paid by direction of the president, Mr. Coleman. Check on Pacific by W. S. Denney, treasurer, is drawn against a balance on the books of this bank.

Other stocks, bonds, and mortgages consist of the following items:

			Dates of deed.
Nantasket Company bonds	113,000		
Framingham & Lowell R. R. bonds	4,000		
Brown, Riley & Co.	64,000		
Nantasket Co. stock	2,000		
Five Cent Savings Bank { C., B. & Q. bonds.	100,000		
Five Cent Savings Bank { Nantasket "	12,000		
Home Savings Bank, Marcus note secured by mortgage	22,759	17	Jan. 25, '81.
Nathaniel M. Jewett, mortgage of real estate in Boston	100,000		Oct. 7, '81.
Thos. Lord & H. G. Parker, trustee note secured by mortg. of real estate	58,450	52	Nov. 17, '81.
E. M. Fowle, trustee mortgage of land	4,500		

			Dates of deed.
And houses at O. S.	1,537 17	6,037 77	May 28, '79.
Mortgage of German Lutheran church		30,000	M'c'h 8, '82.
62 Ellenville Gas Light Co. bond, 500 bond		400	
Lebanon Spring R. R. Co.'s bond (rece'v. cert'f)		15,000	
		527,647 46	
Clark Insulated Wire Co., 1,401 sh's, par value $25		35,025	
Danville & Ohio R. R. bonds		3,000	
Utah & Pleasant Valley R. R.		99,000	
		664,672 46	

The mortgages hereinabove named have been taken in accordance with the provisions of law to protect the bank against loss by paper held by the bank.

Upon these several securities, if a sale should be forced, there would be a very considerable loss. To this fact in my letter, a copy of which is herein given as a part of this report, I called especial attention to this matter, as I have also to the large sources for loss open in every asset account, and to this the directors in their reply, a copy of which is also given, accept the responsibility.

Suspense account, 367,483.34, consists of thirty-seven certificates of deposit, which the counsel of the bank certifies the bank has a legal defence against, the payment of no valuable consideration having been received therefor and practically in the hands of the original parties to whom they were issued.

Other real estate consists of the following items:

	Amount.	Date of Deed.
Deed of land in East Boston	4,500	April 4th, 1881.
" " Newton	10,000	Nov. 8th, 1881.
" " from A. A. Marcus	10,000	Oct. 21, 1881.
" " Taunton Savings B'k	7,500	Deed to come.
Real estate, Commonwealth avenue	137,500	M'ch 11, 1882.
Real estate Mystic avenue	14,276 97	Feb. 20, 1878.
" Winthrop	2,164 91	Sept. 1st, 1881.
" Whitney property	15,000	Deed in transit.
" Wm. Bassett "	1,200	Ocean Spray. July 25, '79.
Real estate, Camden & Tremont Sts.	14,500	Dec. 6, 1881.
63 Real estate, Albion, Cliftondale, Purchase Sts.	18,300	Jan. 20, M'ch 24, '81.
Real estate, Chas. Hurlburt, Dale St.	5,100	Apr. 9, 1880.
Real estate, Hotel St. Leonard	45,000	M'ch 7, 1882.
" " Commonwealth Hotel,	50,000	" 11, 1882.
	335,041 88	

This real estate has all been taken in accordance with the provisions of law to protect the bank against loss by paper taken by the bank.

It is impossible for me to give a valuation to these items. The directors are confident that upon the real estate there will be but little if any loss.

Paper classified "Bad debts," $3,612.84, consists of several items, which should be charged off.

Paper classified "Other suspended and overdue" consists of a large number of items, sixty thousand dollars of which has been overdue the second time. About this paper, as well as about the other paper of the bank, I have little knowledge except that which I obtain from members of the board.

As will be seen by my letter to the board of directors, which is made a part of this report, I have called especial attention to each classification of assets upon which the bank is to rely for rehabilitation, and, as will be seen by the reply of the board of directors, which reply is also made a part of this report, the directors accept the responsibility of again opening the doors of the bank for business.

Before concluding my examination of this bank I addressed a letter to the board of directors, of which the following is a copy:

To the directors of the Pacific National Bank:

GENTLEMEN: You are in session to consider the most important matter connected with your varied, arduous, and continuous labor for the last four months, the summing up of your work and its results. Upon your action to-day must rest largely the reopening of the bank, or the passing of its assets into the hands of a receiver.

You have worked assiduously and continuously, some of you, men of very large and active business, having entirely neglected your own personal matters and given your whole time to the affairs of the bank.

To-day the question is put to you, Is the bank now solvent?
64 Can it be rehabilitated and placed with the other solvent banking institutions of Boston and enter safely into the legitimate competition for a legitimate business and have the result crowned with success?

You have directly or indirectly scanned every piece of paper and every item of bond, mortgage, and real estate which enters into the great total of the bank's assets. You have renewed much of the overdue paper, taken new or additional security, and examined the large volume of "overdue" paper, item by item. You have in almost every instance had the debtor in your presence, conversed with him freely, interrogated him with regard to his means, and reached a conclusion, as I understand, in every case which has been made a matter of record.

Personally, I have called your attention many times during the last four months to the enormous acknowledged liabilities of the bank, and again, in this closing communication, I ask you to weigh fully the certainty of the liabilities and the uncertainty of assets,

which depend upon human life, a varied market, and a healthy and successful business future. I must remind you of the large item of paper classified "overdue," aggregating seven hundred and eighty-one thousand dollars, some sixty-eight thousand dollars of which has been of the renewed paper previously overdue, and now overdue for the second time. I must remind you of the "other stocks, bonds, and mortgages," aggregating more than six hundred thousand dollars, most of which could not find a ready market at prices very considerably below the individual and aggregate values at which they stand in the bank's assets.

I must remind you of the time and demand loan, constituting the great bulk of assets—the backbone of the bank—out of which you are to largely meet the liabilities which you assume of payments on call, and in four, eight, and twelve months, from January 1st, 1882.

I must remind you of the real estate depending for its disposition upon a variable market.

I must remind you that some three hundred and fifty-four thousand three hundred dollars of the assessment to make good lost capital has not yet been paid in.

I must also call to mind the swelling of the liabilities some three hundred and twenty-five thousand dollars by the recognition of the two checks held by the Central National Bank, to wit, one of two hundred thousand dollars and one of one hundred and fifty thousand, drawn Sept. 6th and 8th, 1881, on the Eliot National Bank, and which did not appear upon the books of the Pacific National charged in the Eliot National Bank account.

I am aware that the outstanding checks are *prima facie* evidence of the indebtedness of the bank, and I am also aware that they were grouped with checks recognized in all hands as *bona fide* in-
65 debtedness of the Pacific National in a final adjustment of the unsecured checks held by the Pacific National against T. C. Weeks, who, otherwise, by this settlement, seemed powerless to contribute anything in liquidation of his debt.

With this review of the principal features of the bank's assets and this reminder of the weak and doubtful features of the condition of the bank, I ask your careful and mature action, keeping constantly in mind your duties to the creditors and stockholders of the bank and the great public, who will, of right, discuss the result of your action.

Very respectfully, DANIEL NEEDHAM,
Nat'l Bank Examiner.

To which the directors returned a reply, of which the following is a copy:

BOSTON, *March 11th*, 1882.

To Daniel Needham, Esq., national bank examiner.

SIR: Your letter of this date has been read and carefully considered by the board of directors of the bank. We have, as you say, either directly or indirectly, scrutinized every item of assets held by the bank. We have, directly or indirectly, met most of the debtors

of this bank face to face, and have formed an opinion of the character and responsibility of the men. We have weighed carefully the great aggregate of liabilities, and are impressed with the responsibility we assume when we decide that the doors of the bank can again be opened for business and its obligations met as they have been arranged with a very large proportion of the creditors. It has been by careful consideration that the liability of the bank on the two checks held by the Central National Bank, aggregating three hundred and fifty thousand dollars, upon which T. C. Weeks had paid twenty-five thousand dollars, have been recognized in the settlement of T. C. Weeks as a part of the seven hundred and five thousand dollars which he has paid on his unsecured checks held by the bank, the settlement being the best that could be made, and removing from the bank a liability hereafter to be contested in the courts, involving large expense and uncertain results at the best.

In view of all the facts in the case, and of our most careful and protracted examinations, we decide that the assets of the bank are fully equal to its liabilities, and are not only willing but desirous of taking the responsibility which the reopening of the bank's doors for business imposes upon us.

In behalf of the board:

Respectfully,

LEWIS COLEMAN, *Pres't.*
DANIEL NEEDHAM,
Examiner.

To the Comptroller of the Currency, Washington, D. C.

66 EXHIBIT 13.

Letter, W. J. Best to Comptroller, March 14, 1882.

WASHINGTON, D. C., *March* 13, 1882.

Hon. John Jay Knox, comptroller, etc.

SIR: Referring to our interview of yesterday, concerning the Pacific National Bank, I beg to submit a brief statement as to certain assets, of the value of which you desired more particular information than had been furnished by Col. Needham, national bank examiner.

Under the head of "other stocks and bonds and mortgages," the bank holds—

Nantasket company bonds	125,000
Nantasket company stock	64,000
Utah & P. V. R. R. bonds	99,000

These items aggregate $228,000, and are now worth only about 75 % of their face value; but, as an asset, I feel justified in saying that they are worth par. The transactions through which they came into the bank are well known, and I have excellent reasons for stating that the persons who placed them in the bank can be compelled and will shortly find it to their interest to take them out again at the cost price of $288,000.

The bonds of the Framingham and Lowell R. R., the Danville & Ohio River R. R., the C., B. & Q. R. R., and the Lebanon Springs R. R. receiver's certificates, together amounting to $122,000, are good, interest-paying securities, which could readily be sold at 85 %, even in the present depressed state of all railroad stocks. They cost the bank par, and, in the opinion of persons well informed, will ere long sell at that price, or even higher.

Of the Clark Insulated Wire Co. stock, $35,025, I know but little. A gentleman largely interested in the company informs me that its stock has a prospective value far beyond the sum named. Mr. Coleman and, I think, others connected with the bank, own some of this stock. That held by the bank was taken in part settlement of the indebtedness of an insolvent corporation.

67 The "bonds and mortgages" foot up $217,247.46, and on this large sum the loss will probably not exceed $1,500, which may be sustained on the $6,037.77 mortgage in the name of E. M. Fowle, trustee. The item of $22,759.17 will be offset by an equal amount in our own demand certificates, now held by the Home Savings Bank. This settlement was arranged previous to my leaving Boston last Saturday. The rest of the list are amply secured, and will doubtless be converted into cash or first-class stocks within a few months.

Of the "real estate" upwards of $60,000 will be exchanged for demand certificates that were issued for properties taken from the Home Savings Bank, the Taunton Savings Bank, A. A. Marcus, and others. The Commonwealth avenue lands, the Commonwealth Hotel, and the estate at Camden and Tremont Sts., aggregating $202,000, are not rated at their full market value. I feel quite certain that they will realize the sum stated, and that they can be disposed of during the spring or early summer. The remainder of the real estate amounts to $71,764.91, on which I anticipate a loss of about $25,000.

As to the "notes and bills discounted," I would say that each piece of paper and everything in the shape of collateral have been gone over several times by the directors, and that they did not hesitate to assume the responsibility put upon them by Col. Needham in the letter which he addressed them on the 11th inst. and made a part of his report. The large amount of "past-due" paper could at any moment be almost wholly blotted out by renewals, but I have earnestly advised against this course, for the reason that the makers and indorsers are not entitled to discounts and should be compelled to pay up at once. A large portion, probably about four-fifths, is secured by collateral or indorsements sufficient to cover the whole amount due the bank.

A fair approximation of the loss upon notes and bills discounted, including the "past due," would be from $150,000 to $250,000. It is probable that the minimum sum named will more than cover the actual loss. Of course careful and intelligent, and at the same time energetic, management is required in dealing with this por-

68 tion of the assets, and you may rest assured that nothing will be left undone to insure the most satisfactory results.

The "surplus fund" and "profit and loss" amount to $318,291.44,

and this sum the directors believe ample to cover every possible loss in realizing upon the estate. In this opinion I fully concur and will do all in my power to make it good.

As evidence of what may be accomplished by good management the tables given below speak for themselves. The work already done entitles the directors to the confidence of the Department and the respect of every one in any way interested in the bank. Beside reducing the liabilities nearly $1,200,000 the assets that remain have been strengthened to the extent of at least $500,000; that is to say, mortgages, stocks, and bonds in the amount named have been brought into the bank as collateral where none was held before.

When the bank suspended it had less than $13,000 in cash; now it has nearly $1,000,000, and the amount is steadily increasing.

The surplus that is shown in the bank examiner's report of the condition of the bank represents mainly properties of various kinds that have been secured since Nov. 18, 1881.

In the settlement with T. C. Weeks the bank released of its claims against him $857,500. Notwithstanding the release, he declares that he can and will yet pay to the last penny, and there are many conservative bankers, capitalists, and merchants in Boston who believe that he will do so.

Once before he failed, got his discharge in bankruptcy, resumed business, made money, and paid his old debts in full. All who know him say he is honest, and he has so impressed me. He is a strange character—bright, clever, and a bold operator; a man whom it is difficult to keep down, much less suppress, and who, I believe, would rather have men say of him that he paid his debts than that he was worth millions. From all that I know of him I think there is a fair prospect that he will ultimately pay a portion, perhaps the whole, of his indebtedness to the bank.

I shall lay a copy of this letter before the directors on my return to Boston, and will have them indorse it or send you a similar letter over their individual signatures; meantime you may treat it
69 as fully authorized under the general powers conferred upon me by the vote passed at their meeting last Saturday, a certified copy of which I herewith file.

I have the honor to remain, etc., respectfully, your ob't serv't,

W. J. BEST.

PACIFIC NATIONAL BANK,
BOSTON, *March* 21, 1832.

According to our best knowledge and belief, we think the within statement is correct.

LEWIS COLEMAN.
JOHN SHEPARD.
GEORGE H. FROST.
JAS. H. WHITAKER.
GEO. N. MARCH.
MICAH DYER, JR.
M. P. SPRINGER.
SAMUEL WATTS.
JOHN FALLON.

Nov. 18, 1881:		
Subject to check		1,062,540 10
Demand certificates		1,728,762 53
Banks and bankers:		
General	1,815,936 36	
Howard Nat'l Bank	70,000 00	
5 C. Savings Bank	90,000 00	
		$1,975,936 36
Rediscounts		685,589 61
		$5,452,828 60
March 11, 1882:		
Subject to check	986,380 67	
Demand certificates	1,475,941 62	
Banks and bankers	929,817 51	
Bills payable:		
Cent. Nat'l Bank 419,701 32		
5 C. Savings Bank 90,000 00		
	509,701 32	
70 Rediscounts	382,895 99	
		4,284,737 11
Actual reduction in liabilities		1,168,091 49
Liabilities as above		4,284,737 11
Extensions to March 11	2,648,267 00	
Do. likely to be secured before the bank resumes	153,733 00	
Demand certificates carried to suspense ac. by direction of Col. Needham	367,483 00	
		3,167,483 00
Balance		1,117,254 11
Deduct rediscounts, which it is believed will be paid at maturity		382,895 99
Amount to be provided on resumption		$734,358 12
Cash actually available		954,259 39
Surplus in cash, after paying every obligation not extended or contested		219,901 77

EXHIBIT 14.

PACIFIC NATIONAL BANK,
105 DEVONSHIRE STREET, BOSTON, *January 2nd*, 1882.

We, the undersigned, creditors of the Pacific National Bank of Boston, in consideration of the embarrassed condition of said bank and the agreements of the other parties hereto herein contained, do

hereby, for ourselves and our heirs, executors, and administrators, respectfully covenant and agree with said Pacific National Bank of Boston, its successors and assigns, that we will and hereby do extend the time of payment of our several claims as follows, to wit: one-third thereof to be paid in four months from January 1st, 1882; one-third thereof to be paid in eight months from January 1st, 1882; one-third thereof to be paid in twelve months from
71 January 1st, 1882; interest on each instalment to be paid therewith at the rate of four per cent. per annum; the bank to have the right to anticipate any or all of said instalments.

In witness whereof we have hereto set our hands and our common seal, adopted for this purpose only, this second day of January, one thousand eight hundred and eighty-two.

EXHIBIT 15.

THE PACIFIC NATIONAL BANK,
BOSTON, *March* 16, 1882.

To our depositors:

By vote of the directors and the approval of the Comptroller of the Currency the bank will reopen for business on Saturday, the 18th. Every effort has been made to put the bank again into a sound and solvent condition, and the stockholders have been called upon to pay an assessment of 100 per cent. on their stock, thus making the depositors' balances secure and available. The bank will be run on strict business principles and in the interest of its customers and stockholders, and, while thanking you for past favors, we solicit your confidence and support for the future.

LEWIS COLEMAN, *President.*
E. C. WHITNEY, *Cashier.*

EXHIBIT 16.

(2373.)

Lewis Coleman, president. E. C. Whitney, cashier.

THE PACIFIC NATIONAL BANK,
BOSTON, *April* 21, 1882.

No. 105 Devonshire St., directly opposite post office.

—— ——,
—— ——:

In December last a notice was received from the Comptroller of the Currency, of which the following is a copy:

72 TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

To the Pacific National Bank of Boston, Massachusetts:

The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand

three hundred ($961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent. upon its shareholders, *pro rata*, for the amount of capital stock held by each, and that, if such deficiency shall not be paid and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association, according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereto subscribed my name and caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL.] JNO. JAY KNOX,
Comptroller of the Currency.

In pursuance of the foregoing notice the following vote was passed at the annual meeting of the stockholders held Jan. 10, 1882:

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of 100 per cent. upon the shareholders of the Pacific National Bank of Boston, Mass., *pro rata*, for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith.

More than three months having elapsed since you were notified of said assessment, and the same not having been paid, you are hereby notified that unless said assessment shall be paid on or before April 28, 1882, notice of the sale of your stock at public auction will be published in a newspaper of the city of Boston and posted in the office of this bank, and your stock will be sold according to law on Wednesday, the thirty-first (31) day of May, 1882.

E. C. WHITNEY, *Cashier*.

73 EXHIBIT 17.

Lewis Coleman, president.

PACIFIC NATIONAL BANK,
105 DEVONSHIRE STREET,
BOSTON, *Jan.* 2, 1882.

A meeting of the directors of the Pacific National Bank was held at their rooms this day, when the following votes were adopted unanimously:

"Voted, That in the opinion of said directors an assessment of 100 per cent. upon the stock of said association will place it upon a sound financial basis, provided depositors and creditors shall agree to a reasonable extension of time for the payment of their several claims.

"Voted, That depositors and creditors be requested to sign the

following agreement, and return the same to the bank on or before the 10th inst."

The agreement (Exhibit 14) referred to in the last vote is herewith enclosed. It is very important that you sign and return it to me as soon as possible. The assets of the bank consist almost wholly of discounted paper, which cannot be realized upon immediately without great sacrifice. It would, therefore, be unwise to attempt to resume at an early date unless the creditors generally agree to the extension now asked. Waiting your reply,

Respectfully, &c., LEWIS COLEMAN, *Pres't.*

74 At the request of the directors of the bank Richard Stone went to Washington in December, 1881, before the vote of the directors, Dec. 13, 1881, was passed, and had an interview with Comptroller Knox in relation to the affairs of the bank. Mr. March, one of the directors, and Mr. William J. Best, their agent and a large creditor, were present and took part in the conversation. The fact that a vote had been passed in September previous to increase the capital to a million dollars and that the full amount of that increase had not been subscribed for or paid in when the bank suspended in November was talked over in that conversation. Stone discussed with the comptroller the question as to what should be done in view of those facts and as to what should be regarded as the capital of the bank, and the conclusion of the matter was that such a vote as that of Dec. 13, 1881, should be passed by the directors; that the comptroller should then be notified that the capital had been increased by the sum which had in fact been paid in, and that he should thereupon issue his certificate of increase to the bank to that
75 amount. He expressed his approval of that course. Said Stone reported to the board of directors his interview with the comptroller, and informed them that the course which was adopted was approved by him before the vote was passed.

The comptroller, before Dec. 13, 1881, was informed that the bank was insolvent, owing at least $961,300 (which was the capital stock) more than the value of its assets.

The defendant is 59 years of age; lives in Bath, Me.; is a master mariner. He owned thirty shares in the Pacific National Bank before the passage of the vote, Sept. 13, 1881, to increase the capital stock to $1,000,000. After the passage of that vote he received a printed notice from the cashier, a copy of which is Exhibit 4, annexed hereto. The notice had blank lines at its foot, on which he wrote and signed a subscription for 30 shares of the increase of stock so voted, and returned the subscription to the bank.

Subsequently, on the 16th day of Sept., 1881, he paid $3,000 for the 30 shares so subscribed, and received therefor the following receipt:

"PACIFIC NATIONAL BANK,
"BOSTON, *Sept.* 16, 1881.

"Received of John P. Delano three thousand dollars on acc't of subscription to new stock.

"$3,000. J. M. PETTENGILL, *Cashier.*"

In Oct. he returned the receipt to the bank and received for it certificate No. 780 for thirty shares of new stock, dated Oct. 1, 1881.

When he surrendered his receipt for those thirty shares and received his certificate he did not know that the $500,000 in-
76 crease of capital had not all been taken up, but supposed it had, and then believed that the increase of the capital to a million dollars had been regularly and legally made.

He did not attend the annual meeting of the stockholders held Jan'ry 10, 1882, and had no notice of that meeting except by seeing the notice calling it, published in the Boston Advertiser.

Jan'ry 12 or 13th he received a printed notice that an assessment upon all the stock of the Pacific National Bank of a hundred per cent. had been made. He thereupon consulted Arthur Sewall, of Bath, a large stockholder and director of the Pacific National Bank. Mr. Sewall assured him that there could be no further assessment made on the stock if this was paid; in consequence of which he paid the assessment, $3,000, Jan'ry 20, 1882, and $3,000, Jan'ry 23, 1882, and had it endorsed on each certificate under the date on which it was paid, thus:

"An assessment of one hundred per cent. has been paid on this certificate.

"J. M. PETTENGILL, *Cashier.*"

This payment was made for the purpose of discharging his liability as a stockholder for the payment of the debts of the bank; and he at the time believed it would discharge that liability, or he would not have paid it.

He did not at that time, nor until after the receiver was appointed, know, nor had he ever in any way been informed, that the increase of the capital stock from $500,000 to $1,000,000 had not all been taken and paid in, but supposed and believed that the capi-
77 tal had been regularly increased to a million dollars.

It was not until after the receiver was appointed that the defendant was informed of the action of the board of directors and the Comptroller of the Currency which took place in Dec., 1881, purporting to fix the capital of the Pacific National Bank at $961,300.

He had no information until the taking of his evidence in this case that his name appeared as a stockholder for the new stock in any of the books or records of the bank.

The defendant retained possession of the said certificates of stock to May 22, 1882. The entries on the stock-ledger relating to the defendant are as follows, viz:

On page 53 is the following:

"John P. Delano, Bath, Me.

1879.				
Jan. 17.	By 5 shares		5	500
" 17.	By 2 "		2	200
1879.				
May 13.	By 1 "		1	100
" 13.	By 7 "		7	700

1880.
Jan. 1. By 15 shares 15 1,500
1881.
Oct. 1. By 30 " ..... 30 3,000"

He supposed he was liable for the assessment and would have to pay it, provided he had property enough to pay it. He supposed with that assessment the bank might come out better than it would in the hands of a receiver. He understood the effort was to pay the liabilities of the bank; after that he supposed the stockholders could do as they chose about continuing business.

78 The court found the defendant to be the owner of the number of shares alleged in the declaration on May 20, 1882, and May 22, 1882.

Judgment. (*September* 8, 1885.)

It is thereupon, to wit, September 8, 1885, considered by the court that the said Linus M. Price, receiver, plaintiff, recover of the said John P. Delano, defendant, the sum of six thousand nine hundred and ninety-seven dollars ($6,997) damages and his costs of suit, taxed at ——.

The following bill of exceptions is allowed by the court, and by direction of the court is filed as of September 8, A. D. 1885, before entry of judgment herein, and made a part of the record in this cause.

Defendant's Bill of Exceptions. (*Filed as of Sept.* 8, 1885.)

Be it remembered that upon the trial of this action, the record of which is referred to as a part of this bill, the parties having filed a stipulation in writing with the clerk waiving a jury, each party introduced evidence to maintain on his part the issue joined.

Whereupon the court *formed* the facts specially, and said finding is incorporated into and — part of the record of this case and is entitled "Statement of Facts Found by the Court;" which

79 statement of facts is made a part of this bill of exceptions.

The defendant objected to the admission of Exhibits 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, and 17, which are annexed to said finding of facts, upon the ground that they are, and each of them is, immaterial and irrelevant to the issue to be tried.

The court overruled all these objections and admitted the exhibits; to which rulings in respect to each of said exhibits the defendant then excepted.

He also objected to the admission of Exhibit 9, annexed to said finding, except so much thereof as is a record of the election of a board of directors for said bank, upon the ground that all other matter contained in said exhibit is immaterial and irrelevant to the issue, and also because it was incompetent for the stockholders to pass any vote or do any business at the meeting of which that exhibit purports to be a record except the election of a board of directors,

as the meeting was notified and called for that purpose only; and he specially objected because it was incompetent for said meeting to pass a vote of assessment upon the stockholders of said Pacific National Bank of one hundred per cent. of the amount of its capital stock held by each shareholder, which, by the statement in said exhibit, purports to have been done, and because said exhibit is but hearsay and incompetent evidence of the matters therein recited and set forth (except the election of directors), if the matters themselves were admissible in evidence.

80 The court overruled all the defendant's objections to said exhibit and its contents, and admitted it in evidence, to which ruling the defendant then excepted.

The defendant objected to the admission of the following vote of the directors of said bank, passed Dec. 13, 1881, viz:

"Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable Oct. 1;

And whereas $461,300 of said new stock has been taken and paid in;

And whereas $38,700 thereof has not been taken and paid in:

Voted, That said $38,700 of said stock be, and is hereby, canceled and deducted from said capital stock of $1,000,000 and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association, according to law, because it was incompetent and illegal for the board of directors of said bank to cancel and deduct $38,700 from its capital stock

81 of $1,000,000, or to vote that the paid-up capital of the association amounted to $961,300, or to do any act which purports to have been done by said vote tending to fix the capital stock of said bank at $961,300, or in any way affecting the status of said capital stock.

And he also objected to the admission of the certificate of J. M. Pettengill, cashier, to the Comptroller of the Currency, which is as follows, viz:

"PACIFIC NATIONAL BANK OF BOSTON,
"*December 13th*, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of 'The Pacific National Bank of Boston' has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred [and] sixty one thousand three hundred dollars.

[SEAL.] J. M. PETTENGILL, *Cashier.*"

Because the vote certified by him was not evidence which the Comptroller of the Currency could legally act upon.

The court overruled said objections and admitted the said vote and certificate, to which rulings the defendant excepted.

The defendant also objected to the admission of the certificate of the Comptroller of the Currency, dated Dec. 16, 1881, which is as follows:

82 "TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, *Dec.* 16, 1881.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of "The Pacific National Bank of Boston, Mass.," has been increased in the sum of four hundren and sixty-one thousand three hundred dollars in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in:

Now it is hereby certified that the capital stock of "The Pacific National Bank of Boston, Mass.," aforesaid has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof I hereunto affix my official signature.

[SEAL.] JOHN J. KNOX,
Comptroller."

Because the Comptroller of the Currency had no authority in law to issue said certificate upon the vote certified and forwarded to him by said cashier, and said certificate was null and void and had no legal effect upon the amount of the capital stock of said bank and was not competent evidence of an increase thereof of $461,300.

The court overruled said objections and admitted said cer-
83 tificate in evidence; to which ruling the defendant then excepted.

The defendant also objected to the facts introduced by the plaintiff relating to the suits brought by three creditors after March 18 and before March 20, 1882, as stated in the facts found by the court, as irrelevant and immaterial.

The court overruled the objection and admitted the evidence, and defendant excepted.

Upon the findings of fact by it the court found that the defendant was the owner of the number of shares of stock on May 20, 1882, and May 22, 1882, as declared in that behalf in the declaration; to which finding the defendant then excepted.

And after the evidence introduced by both parties was closed the defendant prayed the court to make sixteen rulings in matters of law, which requests are numbered from 1 to 16, inclusive, and are as follows, viz:

(1.) That by reason of defendant's subscription for 30 shares of the

$500,000 increase of the capital of the Pacific National Bank voted Sept. 13, 1881, and his payment thereof, and receipt and retention of a certificate of stock for that amount, he cannot be held as a stockholder in this action unless it appears that the whole amount of the $500,000 increase voted, and to which he subscribed, was, either before or subsequent to his reception of his certificate, taken and paid in, and the increase of stock to that amount approved by the Comptroller of the Currency. (Refused.)

(2.) That the vote of the directors of the Pacific National Bank, Sept. 13, 1881, that the capital of that bank be increased to one million dollars, and the vote of the directors of said bank, Dec. 13, 1881, in which the attempt was made to limit the increase of the capital to $461,300, and to fix the whole capital at $961,300, and the
84 approval thereof by the Comptroller of the Currency by his certificate, dated Dec. 16, 1881, did not constitute a legal and valid increase of the capital stock of said bank to $961,300. (Refused.)

(3.) That if the action of the directors of said bank and the Comptroller of the Currency, set forth in the preceding request, constituted a valid increase of the capital stock of said bank of $461,300 and to the amount of $961,300, the defendant cannot be held in this action as a shareholder in said increase of $461,300 by reason of his subscription to the increase of $500,000 voted Sept. 13, 1881, and his payment of such subscription and reception of a certificate for thirty shares thereof prior to the failure of the bank, Nov. 18, 1881. (Refused.)

(4.) That the retention by the defendant of said certificate for thirty shares of said $500,000 increase until the final closing of the bank, May 20, 1882, and the payment of the assessment of one hundred per cent. upon the par value of said supposed shares which was made by him Jan'ry 23, 1882, were not sufficient in this case to constitute or hold him as an owner of said shares if he did not know and had never been informed of the said action of the directors Dec. 13, 1881, or of the said action of the comptroller Dec. 16, 1881, certifying the stock at $961,300, until after the receiver was appointed, May 22, 1882, and did not until after that time know, and had never been informed, that the increase of said capital stock to one million dollars voted by the directors Sept. 13, 1881, had not all been taken and paid in. (Refused.)

(5.) That if the votes of the directors of Sept. 13 and Dec.
85 13, 1881, and the certificate of the comptroller dated Dec. 16, 1881, did not constitute a valid increase of the capital of the bank to $961,300, that attempted increase was not validated by subsequent ratifying acts (if such acts there were) by part only of those who had subscribed for and paid in the $461,300 under the vote to increase to $500,000. (Refused.)

(6.) That the amount of the capital stock could not be increased by ratification to a sum less than $961,300, and, if the defendant did acts which might constitute ratification on his part, it would not make the 30 shares of proposed new stock subscribed and paid for by him legal stock unless all the other subscribers to the amount

which had been approved by the Comptroller of the Currency ($461,300) also ratified said increase. (Refused.)

(7.) That if the bank gave the defendant credit upon the stock ledger for the number of shares of the increased capital of $500,000 voted Sept. 13, 1881, for which he subscribed and paid when he received his certificate therefor, which credit remained upon the ledger until the receiver was appointed, the defendant is not thereby precluded from showing either that that increase was never legally perfected or that he is not, and never became, the legal owner of said supposed shares. (Allowed.)

(8.) That if defendant did not direct the entry of his name upon the stock ledger, and did not know that it was entered there, he cannot be affected by such entry. (Allowed.)

(9.) That the entry of defendant's name upon the stock ledger and the retention of it there by the directors cannot affect his
86 liability in this action if it does not appear that any of the present creditors of the bank knew that his name was entered among the stockholders and gave credit to the bank on that account. (Allowed.)

(10.) That the payments by the defendant Jan'ry 20 and Jan'ry 23, 1882, to the directors of the Pacific National Bank, which was then insolvent, and its capital stock lost, and was in the possession and under the control of Needham, of an amount equal to the par value of all the stock which he owned, or of which he held certificates, which was applied towards the payment of the indebtedness of said bank, if made with the understanding and belief on his part that it would discharge him from his liability under the statute to contribute towards the payment of the debts of the bank a sum equal to the par value of his stock, constituted a satisfaction and discharge of that liability, and proof of it is a good defence to this action. (Refused.)

(11.) That the payments by the defendant Jan'ry 20 and Jan'ry 23, 1882, to the directors of the Pacific National Bank, which was then insolvent, and its capital stock lost, and was in the possession and under the control of Needham, of an amount equal to the par value of all the stock which he owned, or of which he held certificates, which was applied toward the payment of the indebtedness of said bank, if made with the understanding and belief that it would discharge him from his liability under the statute to contribute towards the payment of the debts of the bank a sum equal to the par value of his stock, at least constituted a satisfaction and discharge of his liability for all debts contracted before such payment. (Refused.)

87 (12.) That if the defendant paid to Daniel Needham, the bank examiner, while he was in charge of the bank, or to any person acting under his authority in the reception of the payment, a sum of money equal to the par value of all the shares of stock held by him in said bank, which was applied in payment of the debts, contracts, and engagements of the bank, it constituted a discharge of his liability under the statute and is a defence to this action. (Refused.)

(13.) That if defendant paid the assessment upon all the shares held by him, which was voted at the assemblage of stockholders Jan'y 10, 1882, to Daniel Needham while he was in possession and control of the bank, and all money received for the payment of its debts, or to any person authorized by him, such payment constituted a discharge of the defendant's liability under the statute and is a defence to this action. (Refused.)

(14.) If the defendant, since the failure of the bank in Nov., 1881, has paid one assessment of an amount equal to the par value of the shares of stock owned by him, and such payment did not have the effect of restoring the value of his stock to him in any part, but was devoted to the payment of the debts, contracts, and engagements of the bank, he is discharged from further liability under whatever provision of law that assessment may have been made. (Refused.)

(15.) And the effect would be the same of a payment made under the circumstances stated in the foregoing request if the assessment was made voluntarily by the stockholders upon themselves
88 without reference to any provision of the statute relating to making of an assessment. (Refused.)

(16.) That if, after he was notified of the assessment referred to in these requests, the defendant received from a director of the Pacific National Bank assurances that the payment of that assessment would relieve him from all further liability under the statute to contribute towards the payment of the debts of the bank, and was induced to pay the assessment by reason of such assurances, and did thereafterwards pay it to the bank, while it was in Needham's possession, such payment is a satisfaction of his liability sought to be enforced in this action and a defence to it. (Refused.)

But the court rejected each and every one of the said sixteen requests of the defendant, except the 7th, 8th, and 9th, which were granted, and refused to make each of the several rulings prayed for by him in his 1st, 2d, 3d, 4th, 5th, 6th, 10th, 11th, 12th, 13th, 14th, 15th, and 16th requests, to which refusal of the court and rejection of said several requests the defendant then excepted.

And after the court had found the facts specially the defendant prayed the court to rule that "Upon the facts found in this case the plaintiff is not entitled to judgment." But the court refused this prayer, and entered judgment for the plaintiff for the sum of $6,997, as appears by the record.

To which refusal to rule and entry of judgment the defendant then excepted.

And the defendant, insisting upon all his exceptions afore-
89 said, they having been duly taken, prayed the court that this his bill of exceptions be signed and sealed by the court, which is accordingly done, and made a part of the record.

LE BARON B. COLT, [SEAL.]
U. S. Circuit Judge.

A true record.
Attest JOHN G. STETSON, *Clerk.*

A true copy.
Attest: JOHN G. STETSON, *Clerk.*

90 *Clerk's Certificate.*

UNITED STATES OF AMERICA, *Massachusetts District,* } *ss:*

I, John G. Stetson, clerk of the circuit court of the United States for the first circuit and district of Massachusetts, certify that the foregoing is a true copy of the record of said circuit court in the cause of Linus M. Price, receiver, plaintiff, *v.* John P. Delano, defendant, lately determined in said circuit court, and of all proceedings therein.

In testimony whereof I hereunto set my hand and affix the seal of the said circuit court at Boston, in said district, this fifth day of October, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the one hundred and tenth.

[Seal of the Circuit Court, Massachusetts.]

JOHN G. STETSON, *Clerk.*

91 *Assignment of Errors.*

Supreme Court of the United States. October Term, 1885.

JOHN P. DELANO, Defendant, Plaintiff in Error,
v.
LINUS M. PRICE, Receiver, Plaintiff, Defendant in Error.

And now, to wit, on the said eighth day of September, A. D. 1885, before the justices of said —, comes the plaintiff in error, said John P. Delano, and says that in the record and proceedings aforesaid, and also in giving the judgment aforesaid, there is manifest error, to wit:

1. There was error in each of the rulings of said court admitting in evidence each one severally of the records, papers, and documents, copies of which are annexed to and a part of the finding of the facts by the court, which finding is incorporated into and is a part of the record of this case, and is entitled "Statement of facts found by the court," and which records, papers, and documents are, respectively, Exhibits 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, and 17, in said finding of facts.

2. There was error in the ruling of said court admitting in evidence what was assumed to be a record of the doings of a meeting of the stockholders of said Pacific National Bank, held Jan'y 10, 1882,

92 a copy of which is annexed to said finding of facts by the court as "Exhibit 9," except so much thereof as is a record of the election of a board of directors of said bank, which is as follows:

"The following directors were chosen by a stock vote of 4,727 shares against 80 scattering votes: Lewis Coleman, of Boston; John Shephard, of Boston; M. Dyer, Jr., of Boston; M. P. Springer, of Newton; J. H. Whitaker, of Malden; Edwin Ray, of Newton; J. H. Sanborn, of Newton; E. M. Fowle, of Newton; George H. March,

of Watertown ; Arthur Sewall, of Bath ; John E. Cassidy, of Boston ; John Fallon, of Lawrence."

3. There was error in the ruling of said court admitting in evidence the following vote of the directors of said Pacific National Bank, passed Dec. 13, 1881, to wit:

"Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable Oct. 1 ;

And whereas $461,300 of said new stock has been taken and paid in ;

And whereas $38,700 thereof has not been taken and paid in :

Voted, That said $38,700 of said stock be, and is hereby, canceled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300,
and that the whole amount of said increase has been paid in
93 as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law.

4. There was error in the ruling of said court admitting in evidence the following certificate of J. M. Pettengill, the cashier of said bank, to the Comptroller of the Currency, which is dated Dec. 13, 1881, to wit:

"PACIFIC NATIONAL BANK OF BOSTON,
"*Dec.* 13, 1881.

"To the Comptroller of the Currency, Washington, D. C.:

"It is hereby certified that the capital stock of 'The Pacific National Bank of Boston' has been increased, pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred [and] sixty-one thousand three hundred dollars.

[SEAL.] J. M. PETTENGILL, *Cashier.*"

5. There was error in the ruling of said court admitting in evidence the following certificate of John J. Knox, Comptroller of the Currency, dated Dec. 16, 1881, to wit:

"TREASURY DEPARTMENT,
"OFFICE OF COMPTROLLER OF THE CURRENCY,
"WASHINGTON, *Dec.* 16, 1881.

"Whereas satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of 'The Pacific National
Bank of Boston, Mass.,' has been increased in the sum of
94 four hundred and sixty-one thousand three hundred dollars, in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in :

"Now, it is hereby certified that the capital stock of 'The Pacific National Bank of Boston, Mass.,' aforesaid, has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

"In witness whereof I hereunto affix my official signature.

[SEAL.] JOHN J. KNOX, *Comptroller.*"

6. There was error in the ruling of said court admitting in evidence the facts introduced by said Price relating to the suits brought by three creditors after March 18 and before May 20, 1882, as stated in the facts found by the court.

7. There was error in the finding of said court, as a conclusion of law from the facts found by it, that the defendant was the owner of the number of shares of stock in said Pacific National Bank on May 20, 1882, and on May 22, 1882, as declared in that behalf in the declaration.

8. There was error in the ruling of said court in each and every refusal to make the several and separate rulings requested by the defendant in his prayers therefor submitted to the court after the evidence introduced by both parties was closed, to wit:

95 (1.) In refusing to rule as requested, "that by reason of the defendant's subscription for 30 shares of the $500,000 increase of the capital of the Pacific National Bank voted Sept. 13, 1881, and his payment thereof, and receipt and retention of a certificate of stock for that amount, he cannot be held as a stockholder in this action unless it appears that the whole amount of the $500,000 increase voted, and to which he subscribed, was, either before or subsequent to his reception of his certificate, taken and paid in, and the increase of stock to that amount approved by the Comptroller of the Currency."

(2.) In refusing to rule as requested, "that the vote of the directors of the Pacific National Bank, Sept. 13, 1881, that the capital of that bank be increased to one million dollars, and the vote of the directors of said bank, Dec. 13, 1881, in which the attempt was made to limit the increase of the capital to $461,300, and to fix the whole capital at $961,300, and the approval thereof by the Comptroller of the Currency by his certificate dated Dec. 16, 1881, did not constitute a legal and valid increase of the capital stock of said bank to $961,300."

(3.) In refusing to rule as requested, "that if the action of the directors of said bank and the Comptroller of the Currency, set forth in the preceding request, constituted a valid increase of the capital stock of said bank of $461,300, and to the amount of $961,300, the defendant cannot be held in this action as a shareholder in said increase of $461,300 by reason of his subscription to the in-

96 crease of $500,000 voted Sept. 13, 1881, and his payment of such subscription and reception of a certificate for thirty shares thereof prior to the failure of the bank, Nov. 18, 1881."

(4.) In refusing to rule as requested, "that the retention by the de-

fendant of said certificate for thirty shares of said $500,000 increase until the final closing of the bank, May 20, 1882, and the payment of the assessment of one hundred per cent. upon the par value of said supposed shares, which was made by him Jan'y 23, 1882, were not sufficient in this case to constitute or hold him as an owner of said shares if he did not know, and had never been informed, of the said action of the directors Dec. 13, 1881, or of the said action of the comptroller Dec. 16, 1881, certifying the stock at $961,300, until after the receiver was appointed, May 22, 1882, and did not, until after that time, know, and had never been informed, that the increase of said capital stock to one million dollars voted by the directors Sept. 13, 1881, had not all been taken and paid in."

(5.) In refusing to rule as requested, "that if the votes of the directors of Sept. 13 and Dec. 13, 1881, and the certificate of the comptroller dated Dec. 16, 1881, did not constitute a valid increase of the capital of the bank to $961,300, that attempted increase was not validated by subsequent ratifying acts (if such acts there were), by part only of those who subscribed for and paid in the $461,300, under the vote to increase $500,000."

(6.) In refusing to rule as requested, "that the amount of the capital stock could not be increased by ratification to a sum
97 less than $961,300; and if the defendant did acts which might constitute ratification on his part, it would not make the 30 shares of proposed new stock subscribed and paid for by him legal stock unless all the other subscribers to the amount which had been approved by the Comptroller of the Currency ($461,300), also ratified said increase."

(7.) In refusing to rule as requested, "that the payment by the defendant, Jan. 20 and Jan. 23, 1882, to the directors of the Pacific National Bank, which was then insolvent and its capital stock lost and was in the possession and control of Needham, of an amount equal to the par value of all the stock which he owned, or of which he held certificates, which was applied towards the payment of the indebtedness of said bank, if made with the understanding and belief on his part that it would discharge him from his liability under the statute to contribute towards the payment of the debts of the bank a sum equal to the par value of his stock, constituted a satisfaction and discharge of that liability and proof of it is a good defence to this action."

(8.) In refusing to rule as requested, "that the payments by the defendant, Jan. 20 and Jan. 23, 1882, to the directors of the Pacific National Bank, which was then insolvent and its capital stock lost and was in the possession and under the control of Needham, of an amount equal to the par value of all the stock which he owned, or of which he held certificates, which was applied towards the payment of the indebtedness of said bank, if made with the understanding and belief that it would discharge him from his liability under the
98 statute to contribute towards the payment of the debts of the bank a sum equal to the par value of his stock, at least constituted a satisfaction and discharge of his liability for all debts contracted before such payment."

(9.) In refusing to rule as requested, "that if the defendant paid to Daniel Needham, the bank examiner, while he was in charge of the bank, or to any person acting under his authority in the reception of the payment, a sum of money equal to the par value of all the shares of stock held by him in said bank, which was applied in payment of the debts, contracts, and engagements of the bank, it constituted a discharge of his liability under the statute and is a defence to this action."

(10.) In refusing to rule as requested, "that if defendant paid the assessment upon all the shares held by him, which was voted at the assemblage of stockholders, Jan. 10, 1882, to Daniel Needham, while he was in possession and control of the bank and all money received for the payment of its debts, or to any person authorized by him, such payment constituted a discharge of the defendant's liability under the statute and is a defence to this action."

(11.) In refusing to rule as requested, that "if the defendant, since the failure of the bank in Nov., 1881, has paid one assessment of an amount equal to the par value of the shares of stock owned by him, and such payment did not have the effect of restoring the value of his stock to him in any part, but was devoted to the payment of the debts, contracts, and engagements of the bank, he is discharged from further liability, under whatever provision of law that assessment may have been made."

99 (12.) In refusing to rule as requested, that "the effect would be the same of a payment made under the circumstances stated in the foregoing request if the assessment was made voluntarily by the stockholders upon themselves, without reference to any provision of the statute relating to the making of an assessment."

(13.) In refusing to rule as requested, "that if, after he was notified of the assessment referred to in these requests, the defendant received from a director of the Pacific National Bank assurances that the payment of that assessment would relieve him from all further liability under the statute to contribute towards the payment of the debts of the bank, and was induced to pay the assessment by reason of such assurances, and did thereafterwards pay it to the bank, while it was in Needham's possession, such payment is a satisfaction of his liability sought to be enforced in this action and a defence to it."

9. There was error in the ruling of said court refusing the prayer of the defendant made after the court had found the facts specially, which prayer was as follows, to wit: "That upon the facts found in this case the plaintiff is not entitled to judgment," and in rendering judgment for the plaintiff for the sum of $6,997.00.

10. There was error by said court in rendering judgment against the defendant for an assessment upon all the stock of which he was alleged in the declaration to be owner, because, if judgment was authorized for the assessment upon any part of said alleged

100 stock, it was only upon such stock held by the defendant as was created prior to Sept. 13, 1881.

11. There was error by said court in rendering judgment for any

greater part of the assessment made by the Comptroller of the Currency against the defendant than the defendant's due proportion of the debts of said bank contracted subsequent to March 18, 1882.

And the plaintiff, said John P. Delano, prays that the judgment aforesaid may be reversed, annulled, and altogether held for naught, and that he may be restored to all things which he has lost by the occasion of the said judgment.

By A. P. GOULD,
ALFRED D. CHANDLER,
Attorneys for Plaintiff in Error.

101 (*Bond on Writ of Error.*)

Know all men by these presents that we, John P. Delano, of Bath, in the district of Maine, as principal, and Arthur Sewall and William D. Hill, of said Bath, as sureties, are held and firmly bound unto Linus M. Price, a citizen of the State of New Jersey, commorant at Boston, in the State of Massachusetts, receiver of the Pacific National Bank of Boston, in the full and just sum of eight thousand dollars, to be paid to the said Linus M. Price, receiver, his certain attorney, successors, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated the eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately at a circuit court of the United States, within and for the district of Massachusetts, in a suit depending in said court between the said Linus M. Price, receiver, plaintiff, and the said John P. Delano, defendant, judgment was rendered against the said defendant, and the said defendant having procured a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next:

Now, the condition of the above obligation is such that if the said defendant shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be null and void; otherwise to remain in full force and virtue.

J. P. DELANO. [L. S.]
ARTHUR SEWALL. [L. S.]
W. D. HILL. [L. S.]

Signed, sealed, and delivered in presence of—
WINFIELD S. CLARKE.

Approved.
LE BARON B. COLT,
U. S. Circuit Judge.

A true copy of the bond taken by the judge at the time of allowing the writ of error named in said bond, which bond is on file in

the office of the clerk of the circuit court of the United States for the first circuit and district of Massachusetts.

Attest: JOHN G. STETSON,
Clerk U. S. C. C., Mass. Dist.

102 The United States of America to Linus M. Price, of Newark, in the State of New Jersey, a citizen of said State, receiver of the Pacific National Bank of Boston, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States within and for the district of Massachusetts, wherein John P. Delano, of Bath, in the State of Maine, and a citizen thereof, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Le Baron B. Colt, circuit judge of the United States for the first judicial circuit, this eighth day of September, in the year of our Lord one thousand eight hundred and eighty-five.

LE BARON B. COLT,
U. S. Circuit Judge, First Judicial Circuit.

Sufficient service of this citation is acknowledged.

A. A. RANNEY,
For Defendant in Error.

Endorsed on cover: Massachusetts C. C. U. S. No. 1241. John P. Delano, plaintiff in error, *vs.* Peter Butler, receiver of the Pacific National Bank of Boston. Filed January 4, 1886.

118-634

Supreme Court of the United States.

OCTOBER TERM, 1885.

In Equity

No. 1197.—DELANO, Appellant, *vs.* LINUS M. PRICE, Receiver, Appellee.

No. 1198.—MILLS, Appellant, *vs.* SAME.

No. 1199.—TAUNTON SAVINGS B'K, Appellant, *vs.* SAME.

No. 1200.—CHARLESTOWN SAVINGS B'K, Appellant, *vs.* SAME.

No. 1201.—MORRISON, Appellant, *vs.* SAME.

At Law

Actions of Law between the Same Parties numbered 1271–2–3–4–5.

MOTION TO ADVANCE.

The appellee comes and respectfully asks that the above-named cases may be advanced, and a day assigned for their hearing as early as may be practicable, and that they may all be heard together.

He says that he, as receiver of the Pacific National Bank of Boston, a national banking association, appointed by the Comptroller of the Currency to wind up said bank as an insolvent institution, brought in the United States circuit courts in the States of Massachusetts, Maine, New Hampshire, and New York over three hundred suits at law for the purpose of recovering the amount of an assessment made by said Comptroller upon the stockholders of one hundred per centum of the par value of their stock, in order to enforce their indi-

vidual liability, and all of said actions at law, except some ten of them which have been settled, are now pending in said courts; that most all of the stockholders combined to resist the payment of said assessment and to defend said actions; that it was and is claimed that an alleged increase of the capital stock of said bank from $500,000, made by a vote of the directors on September 13, 1881, and December 13, 1881, respectively, and sanctioned by the said Comptroller, was illegal, and that stockholders are not liable to pay the assessment upon the stock under said increase; and also that a voluntary assessment, made by a vote of the stockholders, passed on January 10, 1882, and paid to the bank, served to relieve the stockholders from their individual liability under the said assessment made by said Comptroller, and should be applied in extinguishment of the same. Said suits in equity are brought for the purpose of having the courts so decree and enjoin the prosecution of the suits at law, and the other stockholders decline to pay until the questions involved are first settled by this Court. The bills were dismissed, and an appeal taken. Judgments were rendered for the plaintiff in the actions at law, and writs of error were issued and entered in this Court.

The receiver says there are some fifty or more stockholders the amount of whose assessment exceeds the sum of $5,000, so that they can bring similar bills in equity, and appeal the cases to this Court, and that the actions at law pending against them can be brought to this Court also by writs of error; that the questions of law involved in the said pending suits are common to most of the said three hundred cases, or are likewise raised therein among other questions; that it is highly important, and for the public interest, that the said pending cases in this Court be heard and determined at an early day; that the receiver represents the Government to a great extent as an officer appointed by said Comptroller; that otherwise all of said cases may have to be tried in the courts below, and bills in equity may be

required and brought for similar purposes in many or most of the rest of the same, occasioning great delay and large expenses, and prevent the receiver from closing up the affairs of the said bank for many years to come, when public and private interests require the same to be done as speedily as may be. The receiver believes that if said cases can be heard and tried at an early day it will greatly facilitate the settlement and winding up of the affairs of said bank, and remove the necessity of trying in the courts below most of said actions at law, and prevent the bringing to this Court, in law and equity, nearly one hundred cases. The stockholders in said actions are represented by the same counsel.

The cases are not understood to differ in any very material respect, and will be argued together on one brief.

LINUS M. PRICE,
Receiver.

By A. A. RANNEY,
Attorney.

A. A. RANNEY, *of Counsel.*

118-634

Supreme Court of the United States.

In equity

TAUNTON SAVINGS BANK *vs.* PRICE.

CHARLESTOWN SAVINGS BANK *vs.* SAME.

MORRISON *vs.* SAME.

DELANO *vs.* SAME.

MILLS *vs.* SAME.

At law

The Actions at Law between the Same Parties, numbered, respectively, 1241, '2, '3, '4, and '5.

AFFIDAVIT OF A. A. RANNEY.

I, A. A. Ranney, on oath depose and say: That as counsel for the receiver I am cognizant of the facts set forth in the motion filed in said cases, and believe them to be substantially true as stated therein; that owing to the large number of cases pending, the courts below do not appear inclined to hear the remaining suits, either those wherein the damages were less than $5,000, or those wherein they would exceed that sum, until an effort has been made in this Court to get the actions which have already been tried on appeal or writ of error, advanced, and heard ~~in this Court~~ on hearing.

The Pacific National Bank had a capital stock of $500,000 prior to September 13, 1881, with a right on the part of the directors to increase the same to $1,000,000. The directors voted to increase the capital stock to that sum on September 13, 1881, giving the stockholders the first right to subscribe

and take the increase. Only $461,300 of the increase was subscribed and paid for, and the directors, on December 13, 1881, voted to make the capital $961,300 instead of $1,000,000, and the facts were thereupon communicated to the Comptroller of the Currency for the first time, and he sanctioned the increase to $961,300, and gave a certificate accordingly.

The bank, on November 18, 1881, became embarrassed and suspended business, its capital being either impaired or entirely lost. An examination into its condition was had, and efforts were made to put the bank into a condition to resume business as a solvent institution. Accordingly, at a stockholders' meeting, held on January 10, 1882, it was voted to make and levy a voluntary assessment of one hundred per centum on the par value of the stock increased as aforesaid, and that this should be paid and collected for that purpose. This assessment being collected and paid to the amount of about $643.700, and the balance expected to be paid, representations were made to the Comptroller of the Currency that the bank was rendered solvent again, and leave was asked and obtained for resumption, and the bank did accordingly resume on March 18, 1882, and continued to do a regular banking business, receiving new deposits and contracting new debts to a large amount, until May 20, 1882, when it finally failed again, owing over $2,000,000, and its assets were thereupon put into the hands of a receiver by the order of the Comptroller of the Currency to be wound up as provided by the acts of Congress. The sum of $742.80 of the voluntary assessment, had been paid before May 20, 1882, and all of it had been paid out or lost before the final failure. The comptroller duly made an assessment of one hundred per cent. on the par value of the stock in order to pay the debts of the bank. The receiver demanded the same and brought suits at law to recover. The stockholders combined and proceeded to resist payment and to defend the suits. The main, and substantially the only, grounds of defence are, (1), that the said

alleged increase of stock was irregular and illegal on the alleged ground that the second vote of the directors aforesaid reducing the proposed increase to $461,200 required a vote of the stockholders, which was not had; (2), that the payment of the voluntary assessment aforesaid discharged the stockholders from their personal liability and relieved them from the assessment made by the said comptroller. Suits in equity in five cases were brought for the purpose of having the court so decree and enjoin the prosecution of the suits at law.

These bills upon a hearing were dismissed by the court, and judgments were rendered in the actions at law for the plaintiff. An appeal was taken by the complainant in each suit in equity and writs of error were taken in the actions at law. If the other cases pending in the Court below are pressed for trial, similar suits in equity are designed to be brought, as I am informed and believe. The motion made is presented and urged at the request of the receiver and the Comptroller of the Currency, and, the same counsel appearing in each suit, it is believed that one argument on a side will cover all the cases if heard together, as is desired. The questions presented to this Court in said cases are common, so far as the above facts and claims go, to most all of the cases pending in the courts below.

A. A. RANNEY.

Subscribed and sworn to before me,

118-634

Office Supreme Court U. S.
FILED
OCT 11 1886
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

No. 789.

JOHN P. DELANO, *Appellant*, *v.* PETER BUTLER, *Receiver*.

No. 820.

JOHN P. DELANO, *Plaintiff in Error*, *v.* PETER BUTLER, *Receiver*.

BRIEF FOR JOHN P. DELANO.

GENERAL STATEMENT OF THE CASE.

For about two years prior to Sept. 13, 1881, the Pacific National Bank of Boston had been doing a general banking business in Boston, Massachusetts, with a capital stock of $500,000.

Equity Record, p. 12.
Law Record, p. 8.

The articles of association of the bank provide that "the capital may be increased *according to the provisions of Sect. 5142 of the Revised Statutes*, to any sum not exceeding ten hundred thousand dollars."

Equity Record, Exhibit 1, p. 20.
Law Record, Exhibit 1, p. 14.

Sect. 5142 of the Revised Statutes provides that "No increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained specifying the amount of such increase of capital stock, with his approval thereof, and that it has been duly paid in as part of the capital of such association."

On Sept. 13, 1881, the directors of the Pacific National Bank voted to increase the capital to $1,000,000.

Equity Record, p. 12; Exhibit 3, p. 24.
Law Record, p. 8; Exhibit 3, p. 19.

The following notice was thereupon sent to the stockholders of the bank: —

PACIFIC NATIONAL BANK, 105 Devonshire Street,
BOSTON, Sept. 13, 1881.

At a meeting of the directors of this bank, held this day, it was "*Voted*, That the capital of this bank be increased to $1,000,000, and that stockholders of this date have the right to take the new stock at par in equal amounts to that now held by them." Subscriptions to the new stock will be payable October 1. Parties desiring to anticipate will be allowed interest to that date, at four per cent per annum.

J. M. PETTENGILL, *Cashier*.

Equity Record, p. 12; Exhibit 4, p. 24.
Law Record, p. 8; Exhibit 4, p. 19.

This notice was received by the appellant and plaintiff in error, John P. Delano, a master mariner of Bath, Me., who held thirty shares of the stock of the bank. The notice had blank lines at its bottom, on which Delano wrote and signed a subscription for thirty shares of the increase of stock voted Sept. 13, and returned the subscription to the bank. Subsequently, on the sixteenth day of September, 1881, he paid $3,000 in pursuance of his subscription and received therefor the following receipt: —

$3,000. BOSTON, Sept. 16, 1881.

Received of John P. Delano three thousand dollars on account of subscription to new stock.

J. M. PETTENGILL, *Cashier*.

Equity Record, pp. 81, 82.
Law Record, p. 59.

In October, 1881, he returned the receipt to the bank and received in its place a certificate for thirty shares of new stock, dated Oct. 1, 1881.

Equity Record, p. 82.
Law Record, p. 60.

On Nov. 18, 1881, the bank became unable to meet its debts and liabilities, failed to redeem its circulating notes, and closed its doors to business.

Equity Record, p. 12.
Law Record, p. 8.

At the time of the failure, Nov. 18, 1881, the whole amount of the increase of capital to $1,000,000, to which Delano had subscribed, had not been taken or paid in, and it never was thereafter taken or paid in, and no notice was ever transmitted to the Comptroller of the Currency that it had been taken or paid in. The Comptroller never issued a certificate stating that the capital stock had been increased to the amount of $1,000,000, as voted Sept. 13, 1881, nor did said Comptroller ever certify his approval of such increase, or that it had been duly paid in as a part of the capital of the bank. No action whatever was at any time taken by the Comptroller respecting an increase of stock to $1,000,000.

Equity Record, p. 12.
Law Record, p. 8.

At the time Delano received his certificate for new stock in October, 1881, just before the failure of the bank, he did not know, nor was he in any way informed until after the appointment of the receiver (May 22, 1882), that the increase to $1,000,000, to which he had subscribed, had not all been taken and paid in. He believed when he received his certificate and afterwards that the capital had been validly increased to $1,000,000.

Equity Record, pp. 82, 83.
Law Record, p. 60.

In fact, only $461,300 of the increase of $500,000 was ever taken, all of which $461,300 was paid in on account of subscriptions to the proposed increase to $1,000,000, voted Sept. 13, 1881.

This whole amount of $461,300 was used by the bank in its business, and at the time of the failure, Nov. 18, 1881, *had all been lost.*

Equity Record, pp. 17, 18.
Law Record, pp. 8, 9, 13.

When the bank failed, Nov. 18, 1881, it owed more than $3,000,000 in excess of its assets, and was in fact deeply and hopelessly insolvent.

Indeed, as far back as Sept. 13, 1881, when the directors voted to increase the capital to $1,000,000, the entire capital of the bank

had been lost, and it was then insolvent. This condition of the bank was misstated to or concealed from the stockholders at the time they were induced to subscribe to the increase to $1,000,000.

Equity Record, pp. 16, 17, 18.
Law Record, pp. 9, 13.

On the same day that the bank failed, Nov. 18, 1881, Daniel Needham, a duly appointed examiner of national banks, was placed by the Comptroller of the Currency in exclusive charge and possession of the bank, and all its funds, assets, records and books, and he remained in the exclusive charge and possession of the same, acting under the direction of the Comptroller of the Currency, for a period of four months. The directors of the bank in the mean time had no possession or control over its assets or the money received or paid out on account of the bank, except under the supervision, control and authority of said Needham. During all this time the doors of the bank were closed to business.

Equity Record, p. 13.
Law Record, p. 9.

Soon after the failure of the bank, and before Dec. 13, 1881, the Comptroller of the Currency was informed that the bank was in a most precarious condition and insolvent, owing at least $961,300 more than the value of its assets.

Equity Record, p. 13.
Law Record, pp. 9, 59.

Before Dec. 13, 1881, the Comptroller was also informed of the vote of the directors which had been passed Sept. 13, 1881, to increase the capital of the bank to $1,000,000, and that the full amount of that increase had not been subscribed for when the bank suspended in November. He was also informed that the $461,300 which had been paid in on subscriptions to the increase to $1,000,000, had all been lost.

Equity Record, p. 13.
Law Record, pp. 9, 59.

At a conference held before Dec. 13, 1881, between the Comptroller of the Currency, certain representatives of the directors, and William J. Best, who was a large creditor, the question of what should be considered the capital of the bank was presented to the Comptroller and discussed, and the conclusion was reached that such a vote as that of Dec. 13, 1881, hereinafter set forth, should be passed by the directors, that the Comptroller should then be notified that the capital had been increased to $961,300, and should thereupon issue to the bank his certificate of increase to that amount.

Equity Record, p. 65.
Law Record, p. 59.

In pursuance of such conclusion, on Dec. 13, 1881, when the doors of the bank were closed to business, and when it and all its assets were in the exclusive charge and possession of Daniel Needham, the agent and servant of the Comptroller of the Currency, as aforesaid, and acting under his direction, the directors of the bank passed the following vote: —

Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that the stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas, the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable Oct. 1;

And whereas, $461,300 of said new stock has been taken and paid in;

And whereas, $38,700 thereof has not been taken and paid in.

Voted, That said $38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association, according to law.

Equity Record, pp. 13, 14.
Law Record, pp. 9, 10.

On the same day, J. M. Pettengill, cashier of the bank, acting

under the directors, and upon the suggestion of the Comptroller, that such a certificate should be sent to him, sent the following certificate, sworn to by said cashier, to the Comptroller of the Currency: —

PACIFIC NATIONAL BANK OF BOSTON,
Dec. 13, 1881.

To the Comptroller of the Currency, Washington, D. C.

It is hereby certified that the capital stock of "The Pacific National Bank of Boston" has been increased pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred and sixty-one thousand three hundred dollars.

[SEAL] J. M. PETTENGILL, *Cashier.*

Equity Record, p. 14.
Law Record, p. 10.

On Dec. 16, 1881, the Comptroller of the Currency, knowing that the bank was insolvent and that its capital of $500,000 was all lost, and knowing further that the $461,300 paid into the bank on account of subscriptions to the increase of stock to $1,000,000, was all lost, and without in any way consulting Delano and the other subscribers to that increase, and without his or their consent or knowledge, sent to the directors of the bank the following certificate: —

TREASURY DEPARTMENT,
OFFICE OF THE COMPTROLLER OF THE CURRENCY,
WASHINGTON, Dec. 16, 1881.

Whereas, satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of "The Pacific National Bank of Boston, Mass.," has been increased in the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in.

Now it is hereby certified that the capital stock of "The Pacific National Bank of Boston, Mass.," aforesaid, has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof; and that the said increase

of capital is approved by the Comptroller of the Currency. In witness whereof I hereunto affix my official signature.

[SEAL] JOHN J. KNOX, *Comptroller.*

Equity Record, pp. 13, 14.
Law Record, pp. 9, 10.

On the very same day that the Comptroller thus attempted by his certificate to create new stock to the amount of $461,300, attempting thereby to change the position of the subscribers to the $500,000 increase from that of creditors to that of stockholders with a further certain liability to the amount of $461,300, he sent (apparently by the same mail) to the bank, still in his possession, the following communication: —

WASHINGTON, Dec. 16, 1881.

The Pacific National Bank of Boston, Mass.

The entire capital stock of the Pacific National Bank of Boston, Mass., amounting to nine hundred and sixty-one thousand three hundred dollars ($961,300), *having been lost*, notice is hereby given to said bank, under the provisions of Sect. 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of Sect. 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL] JOHN JAY KNOX, *Comptroller of the Currency.*

Equity Record, pp. 14, 15.
Law Record, pp. 10, 11.

There was no vote of the stockholders of the bank or of subscribers to the increase to one million dollars relating to the increase or reduction of the capital stock of the bank. No opportunity was ever given to the stockholders of the bank to subscribe

for shares in an increase of $461,300, in accordance with the requirements of the Articles of Association.

Equity Record, p. 14.
Law Record, p. 10.

The only meeting of the stockholders of the bank held after the annual meeting of Jan. 11, 1881, was the annual meeting held Jan. 10, 1882. The notice of this meeting, published in the Boston *Daily Advertiser*, was as follows:—

PACIFIC NATIONAL BANK.

The annual meeting of the stockholders of this Bank, for choice of directors and for any other business that may legally come before them, will be held at their banking rooms, 105 Devonshire Street, on Tuesday, Jan. 10, 1882, at 11 o'clock A. M.

J. M. PETTENGILL, *Cashier*.

Equity Record, p. 15.
Law Record, p. 11.

Delano did not attend this meeting and had no notice of it except by seeing the foregoing notice published in the Boston *Advertiser*.

Equity Record, p. 82.
Law Record, p. 60.

On Jan. 12 or 13, he received a printed notice that an assessment of one hundred per cent upon all the stock of the bank had been made. Being assured by a large stockholder and director of the bank, that if he paid this assessment no further assessment could be made, he paid $6,000 on Jan. 23, 1882. The following indorsement was thereupon made upon each of his certificates:—

"An assessment of one hundred per cent has been paid on this certificate.

J. M. PETTENGILL, *Cashier*."

Equity Record, p. 83.
Law Record, p. 60.

At the time of this payment, the bank and all moneys received by it were in exclusive charge of the Comptroller, acting through Needham, his agent.

Equity Record, p. 13.
Law Record, pp. 8, 9.

Delano made this payment for the purpose of discharging his liability as a stockholder for the debts of the bank. He believed this payment would discharge that liability, or he would not have made it.

Equity Record, pp. 83, 84.
Law Record, p. 60.

Delano did not know at the time of this payment, nor was he ever in any way informed until after the receiver had been appointed, that the increase of capital from $500,000 to $1,000,000, to which he had subscribed in September, 1881, had not all been taken and paid in; but he supposed and he believed that the capital had been validly increased to $1,000,000. It was not until after the receiver was appointed that he was informed of the action of the directors on Dec. 13, 1881, or of that of the Comptroller of the Currency on Dec. 16, 1881, purporting to fix the capital stock at $961,300.

Equity Record, p. 83.
Law Record, p. 60.

Delano had no information until the taking of his evidence in these cases that his name appeared in any way on the books or records of the bank, as a stockholder for the new stock.

Equity Record, p. 84.
Law Record, p. 60.

It does not appear that any register or list of stockholders was ever kept in accordance with Sect. 5210 of the Revised Statutes; nor does it appear that the stock ledger of the bank, so called, was even seen by, or its contents made known to, any creditor of the bank or any member of the public.

On March 18, 1882, the amount paid on the assessment of one hundred per cent, including the $6,000 paid by Delano, was $643,000.

This entire sum was paid by the stockholders of the bank and *by some of* the subscribers to the increase voted Sept. 13, 1881, while the bank and all its receipts and assets were in the possession and

under the control of Needham, the representative of the Comptroller of the Currency.

Equity Record, pp. 80, 13.
Law Record, pp. 9, 14.

On March 18, 1882, this entire fund of $643,000 was therefore in the hands of and under the control of said Needham.

Equity Record, p. 13.
Law Record, p. 9.

The bank was then in fact deeply and hopelessly insolvent.

Equity Record, pp. 16, 18, 77.
Law Record, pp. 12, 13.

On March 18, 1882, the Comptroller of the Currency, without consulting Delano, or the stockholders of the bank, or the subscribers to the increase to $1,000,000, or those who had paid in the $643,000 on account of the assessment, surrendered the bank and its assets to the directors, who opened the bank to business. The directors found, however, that they could do, and did in fact do, very little business in banking.

Equity Record, p. 17.
Law Record, p. 13.

From March 18 to May 20, the indebtedness of the bank was paid off and reduced over $2,000,000.

Equity Record, p. 16.
Law Record, p. 12.

The whole amount paid by the stockholders as a contribution towards the payment of the debts of the bank by voluntary assessment, viz., $742,800, including the $6,000 paid by Delano, was applied to the payment of the debts of the bank.

Equity Record, p. 18.
Law Record, p. 13.

There were new liabilities contracted subsequent to March 18, 1882, to the amount of $200,000, but the bank after that time made no new losses.

Equity Record, pp. 16, 19.
Law Record, pp. 12, 13.

The receiver was appointed May 22, 1882. All the assets which were in the bank Nov. 18, 1881, came into the receiver's hands, when he took possession of the bank, except such as had been collected and applied to the payment of the debts and expenses of the bank, and such as had been surrendered on compromise in the settlement of doubtful assets.

Equity Record, p. 16.
Law Record, p. 12.

On Nov. 27, 1882, six months after the appointment of the receiver, the Comptroller of the Currency made another demand or requisition for $961,300 upon the stockholders of the bank and upon the subscribers to the increase to $1,000,000, being an assessment of one hundred per cent upon what was alleged and is alleged by the receiver to be the capital of the bank. The receiver brought suits to enforce this assessment March 14, 1883.

Equity Record, p. 18.
Law Record, p. 13.

In the suit brought against Delano, the receiver alleges him to be the holder of sixty shares of the stock of the bank, and seeks to enforce against him as such a payment of six thousand dollars.

To enjoin the prosecution of the suit so instituted against him, Delano caused to be brought in the Circuit Court for the same district in which the suit itself was pending, the bill in equity, the whole record of which is now before this court upon Delano's appeal. In this bill in equity, Delano prays that the receiver may be enjoined from the further prosecution of said suit against him, and also prays for such other and further relief as to the Court may seem meet.

The claim set forth in the bill in equity, and still urged in this court as the ground for such equitable relief, is that the contribu-

tion by Delano on Jan. 23, 1882, of an amount equal to the par value of the stock held by him, towards a fund which was actually used in the payment of the debts of the bank, the bank then being insolvent, constituted in equity a satisfaction and extinguishment of his liability as a stockholder for the debts of the bank. It is further set forth in said bill, and still urged as an additional ground for equitable relief, that by the payment of the three thousand dollars made by Delano upon the thirty shares of alleged new stock, which in fact never had any legal existence, and on which Delano never incurred any liability, he really contributed towards a fund actually used for the payment of the debts of the bank, an amount equal to two hundred per cent of the stock held by him.

Delano also defended the suit instituted against him by the receiver, the whole record of which has been brought before this court by writ of error, upon two grounds: —

First. That he was not at the time of the appointment of the receiver, or at any time, the holder of sixty shares of the stock of the Pacific National Bank; but was in fact and in law a holder of only thirty shares thereof. Delano's claim is that the attempt on the part of the directors and the Comptroller of the Currency in December, 1881, to fix the capital stock of the bank at $961,300, was contrary to law and void; that the alleged thirty shares of new stock on which Delano is sued never had any legal existence, and that he, by virtue of his subscription in September, 1881, for thirty shares in the then proposed increase of capital from $500,000 to the $1,000,000, and by his other acts, never became liable on account of the debts of the Pacific National Bank, beyond his liability as the holder of thirty shares of valid stock.

Second. That by his contribution in January, 1882, of an amount equal to the par value of all the stock ever held by him towards a fund which was all used in the payment of the debts of the bank, the bank then being insolvent, he in law discharged his liability as a stockholder in said bank, and should therefore have judgment in his favor in the suit pending against him.

SPECIFICATIONS OF ERRORS.

In the Equity Appeal the error in the decree of the Circuit Court, which is here relied upon and urged, is that the Circuit Court ought to have held and adjudged that the contribution by Delano in January, 1882, of an amount equal to the par value of his stock in the Pacific National Bank, towards a fund which was all used in the payment of the debts of the bank, the bank then being insolvent, constituted in equity a performance, satisfaction and extinguishment of his liability as such stockholder, and that the Circuit Court ought to have restrained the receiver from further prosecuting the suit instituted by him against said Delano, and that the Circuit Court erred in not so doing.

The Circuit Court further erred in not granting to Delano, in whole or in part, the relief prayed for in his said bill of complaint.

As plaintiff in error, Delano relies upon and urges all the errors specified in the Assignment of Errors, which make a part of the record of the Writ of Error, beginning on page 67 thereof.

These errors are as follows: —

1. The Circuit Court erred in giving judgment for the defendant in error on the facts found by the Court, and in not giving judgment thereon to the plaintiff in error.

2. There was error in each of the rulings of said court admitting in evidence, each one severally, the records, papers and documents, copies of which are annexed to and a part of the "Statement of Facts found by the Court," and which records, papers and documents are respectively Exhibits 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16 and 17, in the record of the Writ of Error.

3. There was error in the ruling of said court admitting in evidence what was assumed to be a record of the doings of a meeting of the stockholders of said Pacific National Bank, held Jan. 10, 1882, a copy of which is annexed to said finding of facts by the Court as "Exhibit 9," except so much thereof as is a record of the election of a board of directors of said bank, which is as follows: —

"The following directors were chosen by a stock vote of 4,727 shares against eighty scattering votes: Lewis Coleman, of Boston;

John Shepard, of Boston; M. Dyer, Jr., of Boston; M. P. Springer, of Newton; J. H. Whitaker, of Malden; Edwin Ray, of Newton; J. H. Sanborn, of Newton; E. M. Fowle, of Newton; George H. March, of Watertown; Arthur Sewall, of Bath; John E. Cassidy, of Boston; John Fallon, of Lawrence." [The exhibits referred to in the two preceding specifications of error cover forty pages of the record of the Writ of Error, and are not here set out because of their voluminous character.]

4. There was an error in the ruling of said court admitting in evidence the following vote of the directors of said Pacific National Bank, passed Dec. 13, 1881, to wit: —

Voted, That whereas it was voted by this board, on the thirteenth day of September last, that the capital of this bank be increased to one million dollars, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them;

And whereas the stockholders were duly notified of said vote, and also that subscriptions to the new stock would be payable Oct. 1;

And whereas $461,300 of said new stock has been taken and paid in;

And whereas $38,700 thereof has not been taken and paid in;

Voted, That said $38,700 of said stock be and is hereby, cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased in the sum of $461,300, and that the whole amount of said increase has been paid in as a part of the capital of this association, and that he be requested to issue his certificate of said increase to this association according to law.

5. There was error in the ruling of said court admitting in evidence the following certificate of J. M. Pettengill, the cashier of said bank, to the Comptroller of the Currency, which is dated Dec. 13, 1881, to wit: —

PACIFIC NATIONAL BANK, BOSTON,
Dec. 13, 1881.

To the Comptroller of the Currency, Washington, D. C.

It is hereby certified that the capital stock of the "Pacific National Bank of Boston" has been increased, pursuant to the Articles of Association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred and sixty-one thousand three hundred dollars.

[SEAL] J. M. PETTENGILL, *Cashier.*

6. There was error in the ruling of said court admitting in evidence the following certificate of John J. Knox, Comptroller of the Currency, dated Dec. 16, 1881, to wit: —

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, Dec. 16, 1881.

Whereas satisfactory notice has been transmitted to the Comptroller of the Currency, that the capital stock of "The Pacific National Bank of Boston," Mass., has been increased in the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with the provisions of its articles of association, and that the whole amount of such increase has been paid in;

Now, it is hereby certified, that the capital stock of "The Pacific National Bank of Boston," Mass., aforesaid, has been increased, as aforesaid, in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank, as a part of the capital stock thereof, and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof I hereunto affix my official signature.

[SEAL] JOHN J. KNOX, *Comptroller.*

7. There was error in the ruling of said court, admitting in evidence the facts introduced by the receiver, relating to the suits brought by three creditors after March 18, and before May 20, 1882, as stated in the facts found by the court. (Page 13, record of Writ of Error.)

8. There was error in the finding of said court as a conclusion of law from the facts found by it, that the plaintiff in error was the owner of the number of shares of stock in said Pacific National Bank on May 20, 1882, and on May 22, 1882, as declared in that behalf in the declaration.

9. There was error in the ruling of said court in each and every refusal to make the several and separate rulings requested by the plaintiff in error in his prayers therefor submitted to the Court after the evidence introduced by both parties was closed, to wit: —

(1.) In refusing to rule as requested, "that by reason of the plaintiff in error's subscription for thirty shares of the $500,000 increase of the capital of the Pacific National Bank, voted Sept. 13, 1881, and his payment thereof, and receipt and retention of a certificate

of stock for that amount, he cannot be held as a stockholder in this action, unless it appears that the whole amount of the $500,000 increase voted, and to which he subscribed, was, either before or subsequent to his reception of his certificate, taken and paid in, and the increase of stock to that amount approved by the Comptroller of the Currency."

(2.) In refusing to rule as requested, "that the vote of the directors of the Pacific National Bank, Sept. 13, 1881, that the capital of that bank be increased to one million dollars, and the vote of the directors of said bank, Dec. 13, 1881, in which the attempt was made to limit the increase of the capital to $461,300, and to fix the whole capital at $961,300, and the approval thereof by the Comptroller of the Currency by his certificate dated Dec. 16, 1881, did not constitute a legal and valid increase of the capital stock of said bank to $961,300."

(3.) In refusing to rule as requested, "that if the action of the directors of said bank and the Comptroller of the Currency, set forth in the preceding request, constituted a valid increase of the capital stock of said bank of $461,300, and to the amount of $961,300, the plaintiff in error cannot be held in this action as a shareholder in said increase of $461,300 by reason of his subscription to the increase of $500,000 voted Sept. 13, 1881, and his payment of such subscription and reception of a certificate for thirty shares thereof prior to the failure of the bank, Nov. 18, 1881."

(4.) In refusing to rule as requested, "that the retention by the plaintiff in error of said certificate for thirty shares of said $500,000 increase until the final closing of the bank, May 20, 1882, and the payment of the assessment of one hundred per cent upon the par value of said supposed shares, which was made by him Jan. 23, 1882, were not sufficient in this case to constitute or hold him as an owner of said shares, if he did not know, and had never been informed, of the said action of the directors, Dec. 13, 1881, or of the said action of the Comptroller, Dec. 16, 1881, certifying the stock at $961,300, until after the receiver was appointed, May 22, 1882, and did not, until after that time, know, and had never been informed, that the increase of said capital stock to one million dollars, voted by the directors, Sept. 13, 1881, had not all been taken and paid in."

(5.) In refusing to rule as requested, "that if the votes of the directors of Sept. 13 and Dec. 13, 1881, and the certificate of the Comptroller, dated Dec. 16, 1881, did not constitute a valid increase of the capital of the bank to $961,300, that attempted increase was not validated by subsequent ratifying acts (if such acts they were), by part only of those who subscribed for and paid in the $461,300, under the vote to increase $500,000."

(6.) In refusing to rule as requested, "that the amount of the capital stock could not be increased by ratification to a sum less than $961,300; and if the plaintiff in error did acts which might constitute ratification on his part, it would not make the thirty shares of proposed new stock, subscribed and paid for by him, legal stock unless all the other subscribers to the amount which had been approved by the Comptroller of the Currency ($461,300) also ratified said increase."

(7.) In refusing to rule as requested, "that the payment by the plaintiff in error, Jan. 20 and Jan. 23, 1882, to the directors of the Pacific National Bank, which was then insolvent and its capital stock lost and was in the possession and control of Needham, of an amount equal to the par value of all the stock which he owned, or of which he held certificates, which was applied towards the payment of the indebtedness of said bank, if made with the understanding and belief on his part that it would discharge him from liability under the statute to contribute towards the payment of the debts of the bank a sum equal to the par value of his stock, constituted a satisfaction and discharge of that liability, and proof of it is a good defence to this action."

(8.) In refusing to rule as requested, "that the payments by the plaintiff in error, Jan. 20 and Jan. 23, 1882, to the directors of the Pacific National Bank, which was then insolvent and its capital stock lost and was in the possession and under the control of Needham, of an amount equal to the par value of all the stock which he owned or of which he held certificates, which was applied towards the payment of the indebtedness of said bank, if made with the understanding and belief that it would discharge him from his liability under the statute to contribute towards the payment of the debts of

the bank, a sum equal to the par value of his stock, at least constituted a satisfaction and discharge of his liability for all debts contracted before such payment."

(9.) In refusing to rule as requested, "that if the plaintiff in error paid to Daniel Needham, the bank examiner, while he was in charge of the bank, or to any person acting under his authority in the reception of the payment, a sum of money equal to the par value of all the shares of stock held by him in said bank, which was applied in the payment of the debts, contracts and engagements of the bank, it constituted a discharge of his liability under the statute and is a defence to this action."

(10.) In refusing to rule as requested, "that if the plaintiff in error paid the assessment upon all the shares held by him, which was voted at the assemblage of stockholders, Jan. 10, 1882, to Daniel Needham, while he was in possession and control of the bank and all money received for the payment of its debts, or to any person authorized by him, such payment constituted a discharge of the plaintiff in error's liability under the statute and is a defence to this action."

(11.) In refusing to rule as requested, that "if the plaintiff in error, since the failure of the bank in November, 1881, has paid one assessment of an amount equal to the par value of the shares of stock owned by him, and such payment did not have the effect of restoring the value of his stock to him in any part, but was devoted to the payment of the debts, contracts and engagements of the bank, he is discharged from further liability, under whatever provision of law that assessment may have been made."

(12.) In refusing to rule as requested, that "the effect would be the same of a payment made under the circumstances stated in the foregoing request, if the assessment was made voluntarily by the stockholders upon themselves, without reference to any provision of the statute relating to the making of an assessment."

(13.) In refusing to rule as requested, "that if, after he was notified of the assessment referred to in these requests, the plaintiff in error received from a director of the Pacific National Bank assurances that the payment of that assessment would relieve him from all further liability under the statute to contribute towards the payment

of the debts of the bank, and was induced to pay the assessment by reason of such assurances, and did thereafterwards pay it to the bank, while it was in Needham's possession, such payment is a satisfaction of his liability sought to be enforced in this action and a defence to it."

10. There was error by said court in rendering judgment againt the plaintiff in error for an assessment upon all the stock of which he was alleged in the declaration to be owner, because if judgment was authorized for the assessment upon any part of said alleged stock, it was only upon such stock held by the plaintiff in error as was created prior to Sept. 13, 1881.

11. There was error by said court in rendering judgment for any greater part of the assessment made by the Comptroller of the Currency against the plaintiff in error than the plaintiff in error's due proportion of the debts of said bank contracted subsequent to March 18, 1882.

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of the debts of the bank, and was induced to pay the assessment by reason of such assurances, and did thereafterwards pay it to the bank, while it was in Needham's possession, such payment is a satisfaction of his liability sought to be enforced in this action and a defence to it."

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11. There was error by said court in rendering judgment for any greater part of the assessment made by the Comptroller of the Currency against the plaintiff in error than the plaintiff in error's due proportion of the debts of said bank contracted subsequent to March 18, 1882.

ARGUMENT.

The appellant relies on two principal propositions: —

First. He is not a stockholder of the new stock.

Second. He has once paid his full liability.

I.

We deny that the character of holder of the new stock has attached to the appellant and plaintiff in error.

He contracted to take new stock in a bank whose capital should be a million dollars.

Pages 24, 81.

This agreement imposed no obligation to take shares of a smaller capital.

These engagements are as distinct as engagements to take stock in different banks.

Acceptance of certificates, entries on the books, payment of assessments, neither separately nor combined, clothe him with that character in fact, or estop him from denying it.

This is settled by the statute itself. There is a clear distinction between the system provided in the national banking law for the original formation of a corporation, and that provided for the increase of its capital.

Sections 5133–5141, 5168–5180, provide for the creation of a corporate life which comes into being when the articles of association are signed and filed. Its subsequent action will be binding upon the associates, although irregular. The departure from mere mandatory provisions can only be remedied by proceedings instituted by the government.

But Section 5412 expressly declares: "*No increase of capital shall be valid until the whole amount of such increase is paid in, and notice thereof has been transmitted to the Comptroller of the Currency, and his certificate obtained, specifying the amount of such increase*

capital stock with his approval thereof, and that it has been duly paid in as a part of the capital of such association."

The appellant's subscription, payment, taking the certificate and the entry upon the books were mere preparation for or anticipation of the assuming the character of stockholder, when the whole amount should be subscribed, and the approval and certificate of the Comptroller obtained. They conferred no right and imposed no duty upon appellant, except to become a stockholder when the increase became valid, and imposed no obligation upon the bank except to admit him as a stockholder when the proceeding was complete.

If the Comptroller had withheld his approval altogether, surely appellant could not have been held as shareholder, for the single purpose of liability to previous debts and for no other purpose whatever.

> American Tube Works *v.* Boston Machine Co., 139 Mass. 5.
> Reed *v.* Boston Machine Co., 141 Mass. 454.

In the former case all the elements found here exist, with the additional fact that plaintiffs had actually received dividends on the illegal stock. Allen, J., says: "In all the cases which have come under our observation, where one has been held to be a stockholder by estoppel, there has been a legal creation of the capital stock."

There is no distinction in principle between an attempted increase of capital beyond the amount expressly limited in the charter, and an attempted increase, which the law expressly declares shall not be valid until the consent of the public officer who has control of the subject, be obtained.

The consent of the Comptroller takes the place of the legislative consent, which, in either case, would be sufficient to authorize an increase beyond the original limit.

The issue of the increase was, by the express terms of the statute, *ultra vires.*

In Scovill *v.* Thayer, 105 U. S. 143, it is held that in such case an alleged stockholder is not estopped by receiving certificates, attending corporate meetings, or by the fact that the corporation had held itself out as having increased capital, and so obtained increased credit.

The Court say: —

"The increased stock itself was void. It conferred on the holders no rights, and subjected them to no liabilities. If the stock of the first and second issues had been held by one set of holders, and the stock of the third and fourth by another, in a contest between them, the latter would have been excluded from all participation in the management of the company or in its profits. To decide that the holders of stock issued *ultra vires* have the same rights as the holders of authorized stock, is to ignore and override the limitations and prohibitions of the charter. We think it follows that, if the holder of such spurious stock has none of the rights, he can be subjected to none of the liabilities of the holder of genuine stock. His contract to pay for spurious shares is without consideration, and cannot be enforced. The corporation being absolutely without power to increase its stock above a certain limit, the acquiescence of the shareholder can neither give it validity, nor bind him or the corporation."

The acts of the stockholders, until the certificate of the Comptroller, are nothing more than propositions among themselves.

Charleston *v.* People's Nat. Bank, 5 Rich. So. Car. 103.

In all the cases cited on the other side, so far as we have examined them, the Court hold the stock valid, notwithstanding irregularities. If the corporations had been solvent and gone on, the stockholders, under the principle of those decisions, would have established their right to dividends and to vote. Here, it is clear that until after the certificate of the Comptroller, which was itself long after the facts relied on as an estoppel, no such relation to this corporation in respect to its new stock ever existed.

So far as the certificate is concerned, that is a strange estoppel which estops a person from denying that he is the owner of that which does not exist; that he is a stockholder of no stock. The reasoning of Scovill *v.* Thayer is fully applicable here. If there had been a dividend declared after the issue of these certificates and before the Comptroller's certificate, the old stockholders could have prevented the new ones from receiving it. If there had been a meeting, the old stockholders could have prevented the new ones from voting. There is no single privilege of a stockholder which

the holders of the certificates could have claimed after their issue, until the five hundred thousand dollars had been all paid in, and the Comptroller's certificate to the payment of the increase, and his approval thereof obtained.

Upton *v.* Tribilcock, 91 U. S. 45, Sanger *v.* Upton, 91 U. S. 56, Webster *v.* Upton, 91 U. S. 65, Chubb *v.* Upton, 95 U. S. 665, and Pullman *v.* Upton, 96 U. S. 328, deal only with the case of subscriptions obtained by fraud, or stock which the corporation had a right to issue, but issued irregularly, or stock *de facto* in corporations irregularly organized.

Neither party to the transaction understood the payment of the money, the certificates, or the entries, as conferring any rights upon anybody until the whole half million was paid, and the Comptroller's certificate obtained. They were mere acts of preparation or anticipation.

Certainly there must be some limit to an estoppel. The clerk of a bankrupt corporation cannot, by entering a name on the stock book for any number of shares he pleases, render the person named liable for all or any part of its debts. Could the cashier of this bank, by a stroke of his pen, charge any number of the richest men in Boston with shares to the amount of $1,000,000, and thereby render them liable for these debts?

The presumption arising from entry in a stock book does not apply when all the facts are before the court. No case can be conceived where a person, not a stockholder on all other facts, becomes one by putting his name on a book without his authority.

The certificate and entry in stock book must purport to be shares in some specific capital. There can be no such thing as a share, unless there be a unit which is shared. A numerator is without meaning unless there be a denominator. Until there has been a unit of capital duly created, there can be no such thing as an estoppel to deny holding shares therein.

If it were essential to our argument, we should respectfully ask the Court to reconsider the dictum of Mr. Justice Hunt, in Chubb *v.* Upton, 95 U. S. 665, 668, that "it not necessary to sustain the action against a subscriber, that there should have been a subscription for the whole amount named in the articles." If this be true to any

extent, we conceive it can be only true in cases where a corporation has begun business lawfully, might lawfully have limited its increase to the amount actually subscribed without the assent of any other authority, so that the subscriber would become a shareholder in a going concern, and where the circumstances attending the issue of the certificates immediately, show that to have been the intent of the parties. See cases collected in

1 Morawetz, Sect. 142.
Rensselaer Plank Road Co. *v.* Wetsel, 21 Barb. (N. Y.) 56.

But the present case is as if the subscription paper had itself contained the express condition that the bank would not admit the subscriber to the character of stockholder, until the whole amount should be subscribed.

Lexington R. R. *v.* Chandler, 13 Mich. 311.
Troy & Greenfield R. R. *v.* Newton, 8 Gray, 596.
Worcester & Nashua R. R. *v.* Hinds, 8 Cush. 110.
City Hotel *v.* Dickinson, 6 Gray, 586.
Boston & Barre R. R. *v.* Wellington, 113 Mass. 79.
Boston R. R. *v.* Pearson, 128 Mass. 445.

Creditors, in dealing with corporations, are bound to take notice of the limitations of their charters, and, *à fortiori*, of the limitations of the general law.

2 Morawetz, Private Corp., 849.
Scovill *v.* Thayer, 105 U. S. 143, 149.
Pearce *v.* Madison R. R., 21 How. 441, 443.
In re County Life Ass. Co., L. R., 5 Ch. App. 288.

The book produced by the receiver is not a stock register. It is a mere debt and credit account with the stockholder, p. 88.

Ins. Co. *v.* Hastings, 2 Allen, 398.

We come then to the action of the directors of Dec. 13, 1881, and the two certificates of the Comptroller, dated Dec. 16, 1881.

Dec. 13, 1881, the bank was wholly insolvent. Its capital was entirely gone, and its liabilities were more than three million dollars

in excess of its capital and assets. It failed to redeem its circulating notes, or to pay debts or depositors in the course of business. Its doors were closed (pp. 12, 13); its officers were excluded from all control of its affairs by the order of the Comptroller (p. 13).

Needham, the bank examiner, although not styled receiver in the order, was in fact executing the functions of receiver, and not of visitor or examiner, so far as his custody and control of the bank were concerned.

Rev. Stat. §§ 5240, 5241.

This was a clear case of insolvency, and these were clear acts of insolvency within the meaning of Sect. 5242. They were due and public notice to every shareholder and creditor that the power of the bank to deal in any manner with its assets, except to preserve them and to redeem bills, was gone. It could make no binding contract; even a seizure and sale of its property on an adversary suit would be void.

National Bank *v.* Colby, 21 Wall. 609.

The purpose to violate the provisions of Sect. 5242 would be inferred as matter of law from any payment or transfer of the property under these circumstances, and notice of such purpose be imputed to both parties.

This is very well stated in Pratt's digest of the National Bank Act in the note to Sect. 5242: "It is plain that a bank is bankrupt at the moment that it cannot pay legitimate demands upon it in current funds; and the very fact that when a demand is made, a bank offers something other than current funds, would appear to be presumptive evidence of insolvency. It is expected, from the very nature of the business, that a bank will always conduct its business so as to be prepared to meet all demands by immediate payment in money. In practice, however, it is often very difficult to determine the exact date of the insolvency, inasmuch as a bank may be really insolvent and yet be able to meet demands to some small extent in current funds; and it may be able, by disposing of its more easily liquidated assets, such as bonds, or the best of its bills receivable, to supply itself with current funds to meet considerable demands.

But while the exact moment of insolvency is extremely difficult to fix theoretically, still practically, in each actual case, there comes a time when the officers are aware they cannot continue business. *Usually, when they come to this conclusion, the institution closes its doors, and this act is the act of insolvency mentioned in the section.*

"It rarely, however, happens that a bank closes its doors, but it subsequently appears, by competent evidence, that for days, weeks, or months prior to the actual closure, the officers must have been aware that there was no hope for the institution, and they are not excusable because they permitted themselves to be led by false hopes, but it is presumed that things appeared to them as they would appear under like circumstances to competent business men. If it can be proved that after the institution was in such condition that competent bankers would have closed its doors, the officers paid out moneys, etc., all such acts would be null and void, and when creditors were paid in other than current funds, say in bills receivable or other unliquidated assets, such creditors would doubtless be considered to have been put on notice, and could be compelled to refund and await *pro rata* distribution."

Such being the case, the directors had no power to pass the vote fixing the capital at $961,300, and that whether the act be treated as an attempted reduction of the capital, which could only be effected by a two-thirds vote of the shareholders (Sect. 5143), or as a new and original attempt to increase.

It is clear they had no authority to reduce the capital: first, because that power only resides in the stockholders (Rev. St., § 5143); second, because the capital had never been lawfully increased to the point from which they were to reduce it.

Yet it seems clear that reduction and not increase was what they attempted by the vote of Dec. 13, 1881. After reciting the vote to increase to a million, and that the subscriptions were payable Oct. 1, and that "$461,300 of said new stock has been taken and paid in," they vote that "$38,700 of said stock be, and is hereby, cancelled and deducted from said capital stock of $1,000,000," etc. This purpose is further made clear by the fact that the transaction was illegal as an original increase, because there was no offer of the new

stock *pro rata* to holders of the old stock as the Articles of Association (Sect. 5, p. 16, and By-Law, Sect. 11, p. 17) require.

But this is of minor importance. The directors were at that date totally incompetent to bind the bank by the contract which the acceptance of a subscription or payment to stock implies.

The acceptance of a subscription and payment to the stock of a bank implies a contract on the part of the corporation to take the money and employ it in the business of banking. It implies a contract to give him a right as stockholder to his equal control and management of a banking business to be thereafter conducted. If it be an increase, it is a contract for a sale to him of a proportionate joint ownership of an existing capital then engaged and thereafter to be engaged in the business of banking. How can an agency make such a contract which could not lawfully pay a creditor other then a bill-holder a debt of twenty-five cents? If into the ordinary contract for the sale of goods on credit there enter the implied condition that the buyer shall keep his credit good till the transaction be complete, does not this condition enter into the authority of directors to hold third persons or bind their own corporations by contracts to continue the business?

On the same thirteenth day of December, 1881, the cashier sent to the Comptroller a certificate that the capital stock had been increased and the increase all paid in. In point of fact, not a dollar had at that time been subscribed or paid in toward any increase voted by the directors on that day. The subscribers to the new $500,000, under the former vote, might each of them have demanded that his money should be returned immediately on the passage of the vote fixing the amount at $461,300. Nothing, certainly, had yet happened which made any subscriber liable as shareholder.

On the same day the Comptroller issued his two certificates, one declaring that the new stock was all paid in, the other declaring that it was all gone, and directing an assessment (pp. 14, 15).

We submit that neither of these certificates had any validity whatever.

The Comptroller is not a judicial officer. He cannot bind any citizen by a decree or judgment. It is true, his certificate is conclusive upon the question whether a bank is duly organized, and

upon the question how much of the stockholders' liability needs to be enforced.

Kennedy *v.* Gibson, 8 Wall. 498.
Bank *v.* Kennedy, 17 Wall. 20.
Casey *v.* Galli, 94 U. S. 673.
Sanger *v.* Upton, 91 U. S. 56.

A person who has become a shareholder in a bank so far submits himself to the Comptroller's authority; and the enforcement of this submission is necessary for the due protection of the public.

But it cannot be claimed that the Comptroller can by his certificate impose upon persons the character of shareholders without their consent. Nor will it be doubted, we presume, that if the Comptroller be about to give such certificate illegally or contrary to the fact, any person who would be aggrieved thereby may have judicial process to restrain him.

United States *v.* Knox, 102 U. S. 422.

If, then, the act of the Comptroller be performed under such circumstances that it is impossible to apply for an injunction in advance, it must be that the facts may be shown in defence, especially in cases where no new rights have attached in consequence of reliance on his action.

The Comptroller could not lawfully certify to an increase of capital made illegally, for the reasons heretofore stated.

Nor could he properly and lawfully certify that the capital "had been increased in accordance with the provisions of the Articles of Association," and that "said increase of capital has been paid into said bank as a part of the capital stock thereof," or lawfully certify his approval of such increase, when the fact was at that moment known to him that the amount was all gone, that it never had been received as capital, but had been applied to the partial reduction of the indebtedness of a bank still insolvent.

The law will not stick at the phrase "has been duly paid in." It is the substance of an increase of capital to which he is authorized to certify. The fact that it is there, not the fact that it was paid

weeks or months ago, is the essential fact which he is to declare. It must be there as an existent, present fund, to which the public may trust in dealing with the bank, on the one hand, and which is to stand between the shareholders and their liability for debts on the other.

The Comptroller erred, therefore, in deeming himself authorized to certify that the capital had been increased.

He also erred in deeming that he had authority to require an assessment on this increase. The case of a capital "impaired by losses or otherwise," contemplated in Section 5205, does not exist where the capital is all gone and the bank is insolvent.

We claim that there is nothing in this case which creates an estoppel. The liability of the alleged shareholders must depend upón the actual facts, and not on any artificial presumptions.

There has been no change, except for their advantage, in the position of the old creditors. The estoppel can at best only be invoked in behalf of the new creditors, some $200,000 in amount, who contracted with the corporation during the brief period of resumption, and after the alleged increase in stock. Their rights, if any they have, can be preserved in the decree, if the Court think fit.

II.

Our second general proposition is that the liability of all the shareholders has been equitably discharged by the payment of the assessment.

This case is totally distinguishable, in this respect, from Scoville *v.* Thayer, 105 U. S. 141. In that case Thayer had subscribed for certain valid shares in a Kansas corporation, and had paid in a part of their par value. The company afterward undertook to increase its capital beyond the amount authorized by law, and he subscribed and partly paid for certain unauthorized stock. He had an agreement with the company that no further calls should be made upon him, which agreement was void as against an assignee of the company in bankruptcy. The Court held that, on a suit by such assignee to recover the unpaid balance due on his authorized stock, he could not set off the sums paid by him on the invalid stock.

Mr. Thayer's original subscription was, as between him and the representative of the creditors, a promise to contribute to a fund for their use. The money paid by him on the said stock not being applicable to the purpose for which it was intended, was, in the view most favorable for him, money received by the company to his use, constituting him an ordinary creditor to that amount. The Court say that "no call had been made for contribution on the valid stock, to which the amounts paid on the void stock could be said to apply. No call could have been made by the company under its agreement with the stockholders, unless to pay its creditors, and it does not appear that when the payments were made the company had any creditors." The money paid in that case never, so far as appears, benefited a creditor in the slightest degree. It may, so far as appears, have been paid for the purchase of a mine which proved worthless, or for working a mine which proved unprofitable.

See also

Sawyer *v.* Hoag, 17 Wallace, 610.
Sanger *v.* Upton, 91 U. S. 56.
Scammon *v.* Kimball, 92 U. S. 362.
Morgan *v.* Allen, 103 U. S. 498.

But in the case at bar, the money paid under a supposed liability went directly to reduce the volume of debts, as is expressly found by the Court under an assessment made for that sole purpose. The order by the Comptroller, and the voluntary consent by the supposed shareholder, to pay in one hundred per cent on the supposed capital, were an order and consent to pay that amount to the creditors, and actually accomplished that purpose. It was an actual performance of one obligation by parties who mistakenly supposed they were performing another. In form, it was an attempt to make good the capital. In fact, it was simply a reduction of the volume of debt.

The entire deficiency was never paid. Pursuant, therefore, to the notice of the Comptroller of Dec. 16, 1881, the receivership therein stated went on. The question with which we have now to deal is the same as if one shareholder only had brought to the officer his assessment on the full amount of his stock, paid it over to the representative of the government in charge, been assured by him

that it was in full discharge of his liability; and, the sum paid having been actually applied to the payment of debts, been called upon by the receiver to pay again.

We do not rely on the assurances given by Mr. Needham to the stockholders as binding upon the receiver as an engagement. But they establish and interpret the purpose of the payment. They show that a discharge of the statute liability was the intent of the transaction.

The authorities cited below seem to us conclusively to establish the proposition that a statute liability for the debts of a corporation is discharged *pro tanto* by an advancement to the corporation to pay debts, or by a payment of the debt of any single creditor, in cases where the liability is direct to individual creditors. We claim that the principle is applicable where the liability is to a receiver, who is to distribute the fund among all creditors *pro rata*, and a payment has been made to a general fund of which creditors have the benefit, and which cannot lawfully be paid out in any mode which operates as a preference.

It is clear that the giving of the bank to its officers by Needham, and the subsequent payment of debts, were illegal after the acts of bankruptcy already committed, and that the receiver can recover back all sums, if any, paid out by way of preference.

But it also appears that the effect of the brief resumption was largely to benefit creditors, on the whole. They are in the same condition as if the Court had authorized an assignee in bankruptcy to continue business for the benefit of creditors, and his conduct of the business had resulted in investing the assets and diminishing the liabilities.

Assuming, then, that it is established that these alleged shareholders have paid in voluntarily a sum they were not obliged to pay, with intent that it should be applied to increase a fund to discharge the indebtedness of the bank, and that it has been so applied, and the creditors collectively and individually are thereby in better condition than if the method provided by law had been strictly pursued, we submit that on well-established principles of equity such payment will be treated as a discharge of the statute obligation.

This may be treated either as
An equitable performance of the obligation,
An equitable satisfaction,
A substituted performance,
Or an equitable set-off.

It is not important to consider carefully the distinction between them. They all rest upon the general principle, that equity will not permit double benefits where but one benefit is intended, or impose double burdens where but one obligation is due. The money due from these debtors has reached these creditors, and the substance of their obligations has been fully performed.

Terry *v.* Little, 101 U. S. 216, 218.
2 Pomeroy, Eq. Jur. § 579.
Smith, Principles of Eq. p. 461.
1 Pomeroy, Eq. Jur. 859.
Tubbs *v.* Broadwood, 2 Russ. & M. 487.
Lechmere *v.* Carlisle, 3 P. Wms. 227.
Lowden *v.* Lowden, 1 Bro. Ch. 582.
Leach *v.* Leach, 10 Ves. 516.
Wilcox *v.* Wilcox, 2 Vernon, 558.
2 Lead. Cas. in Eq. 833, 4 Am. Ed.
Blandy *v.* Widmore, 1 P. Wms. 323.
Deacon *v.* Smith, 2 Atk. 323.
1 Pom. Eq. 88, 420, 421, 461, 520, 521.
2 Ib. 580.
1 Story, Eq. Jur. 1107.
2 Ib. 1099, 1104.
Smith, Eq. 444.
Ex parte Pye, 18 Ves. 140.
Hinchcliffe *v.* Hinchcliffe, 3 Ves. 516.
Thynne *v.* Glengale, 2 H. L. Cas. 131.
2 Redfield, Wills (2d Ed.), 515 *et seq.*, Sec. 10, Sec. XI., p. 525, cases cited in note.
Raleigh *v.* Raleigh, 35 Ill. 512.
Briggs *v.* Penniman, 8 Conn. 390.
Tallmadge *v.* Fishkill Iron Co., 4 Barb. 382.

Jones *v.* Wiltberger, 42 Ga. 578.
Thompson's Liability of Stockholders, 392.
Lee *v.* Lee, 31 Georgia, 26.
1 Story's Eq. 840.
2 Pomeroy, 952.
United States *v.* Knox, 102 U. S. 422, 425.
Hindustan *v.* Alison, L. R. 6, C. P. 54.
Marine Bank *v.* Fulton Bank, 2 Wall. 256.
Scammon *v.* Kimball, 92 U. S. 370.
National Bank *v.* Ins. Co., 104 U. S. 54.
Patterson *v.* Lynde, 106 U. S. 519.
Smith *v.* Hurd, 12 Metc. 371.

No offer to return the certificates or notice to rescind the transaction was necessary. The transaction never took effect. Nothing ever passed to these alleged stockholders as against the corporation. There was nothing to be avoided or rescinded, and the certificates were of no value so as to need to be returned.

Reed *v.* Boston Machine Co., 141 Mass. 454.
Am. Tube Works *v.* Boston Machine Co., 139 Mass. 11.

GEORGE F. HOAR.
BENJAMIN N. JOHNSON.

118-634

Office Supreme Court U. S.
FILED.
OCT 11 1886
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CLERK.

Supreme Court of the United States.

No. 789.
JOHN P. DELANO, *Appellant*, *v.* PETER BUTLER, *Receiver*.

No. 820.
JOHN P. DELANO, *Plaintiff in Error*, *v.* PETER BUTLER, *Receiver*.

No. 790.
HARVEY MILLS, *Appellant*, *v.* PETER BUTLER, *Receiver*.

No. 812.
HARVEY MILLS, *Plaintiff in Error*, *v.* PETER BUTLER, *Receiver*.

No. 791.
THE TAUNTON SAVINGS BANK, *Appellant*, *v.* PETER BUTLER, *Receiver*.

No. 822.
THE TAUNTON SAVINGS BANK, *Plaintiff in Error*, *v.* PETER BUTLER, *Receiver*.

No. 792.
THE CHARLESTOWN FIVE-CENT SAVINGS BANK, *Appellant*,
v.
PETER BUTLER, *Receiver*.

No. 823.
THE CHARLESTOWN FIVE-CENT SAVINGS BANK, *Plaintiff in Error*,
v.
PETER BUTLER, *Receiver*.

No. 793.
CHARLES E. MORRISON, *Appellant*, *v.* PETER BUTLER, *Receiver*.

No. 824.
CHARLES E. MORRISON, *Plaintiff in Error*, *v.* PETER BUTLER, *Receiver*.

ADDITIONAL BRIEF FOR APPELLANTS AND PLAINTIFFS IN ERROR.

Statement of Points for Appellants in Equity.

I.

Contribution by the appellants of an amount equal to the par value of their stock to the fund which was devoted to the payment of the debts of the bank, constituted an equitable performance of the

obligation imposed upon them by R. S., Sect. 5151; and the actions at law against them, therefore, should be enjoined.

2 Pomeroy's Eq., Sects. 578, 579.
Smith's Principles of Eq., 461, 462.
1 Pom. Eq., Sect. 59.
Tubbs v. *Broadwood*, 2 Russell & Mylne, 487.
Lechmere v. *Carlisle*, 3 Peere Williams, 227.
Sowden v. *Sowden*, 1 Brown's Ch. 582.
Lench v. *Lench*, 10 Ves. 516.
Wilcocks v. *Wilcocks*, 2 Vernon, 558.
Blandy v. *Widmore*, 1 Peere Williams, 323.
Deacon v. *Smith*, 2 Atk. 323.
1 Pomeroy's Eq., Sects. 420, 421.
2 *Ib.*, Sect. 580.
1 Story's Eq., Sect. 1107.
United States v. *Knox*, 102 U. S. 422, 425; R. S., Sects. 718, 719.
Rule 55.
2 Lead Cas. in Eq. (4th Am. Ed. 833).

II.

Appellants may also avail themselves of the doctrine of *equitable satisfaction*, in which intention, either express or implied, is required.

2 Story's Eq., Sects. 1099, 1104.
1 Pomeroy's Eq., Sects. 520, 521, 461.
Smith's Principles of Eq., 444.
Pye, Dubost, *ex parte*, 18 Ves. 140.
Hinchcliff v. *Hinchcliff*, 3 Ves. 516.
Thymme v. *The Earl of Glengall*, 2 H. L. Case, 131.
2 Redfield on Wills (2d ed.), p. 515 *et seq.* Sect. 10; Sect. 11, p. 525, and authorities in note.

III.

Application of the principle of equitable set-off to the facts of this case should also preclude recovery by the receiver in his actions at law against the appellants.

Raleigh v. *Raleigh*, 35 Ill. 512.
Briggs v. *Penniman*, 8 Cow. 390.
Tallmadge v. *Fishkill Iron Co.*, 4 Barb. 382.
Jones v. *Wiltberger*, 42 Ga. 578.
Thompson's Liability of Stockholders, Sect. 392.
Lee v. *Lee*, 31 Ga. 26.

Appellants' voluntary payment of one hundred per cent on their stock may, in equity, be allowed in set-off to the assessment by the Comptroller.

IV.

No valid assessment by the association under Sect. 5205 was ever made, as the meeting of Jan. 10, 1882, was not legally called for that purpose.

But, if the meeting and assessment had been legal, the primary object of an assessment under that section of the statute is *to pay the debts of the bank;* and the relief of the stock from impairment is only a *consequence* of such payment. If the deficiency in the capital stock is not paid or made good by such assessment, the stockholder derives no such benefit from his payment; but his money is, nevertheless, appropriated to the payment of debts, and his statute liability is satisfied.

The debts of the Pacific Bank at the time the appellants paid the one hundred per cent upon the par value of their stock, exceeded the value of its assets nearly $3,000,000. The capital stock was but $500,000. Appellants could receive no benefit by such payment, unless it operated as a relief from further liability to contribute to the payment of debts.

V.

The purpose of the statute is to impose upon a stockholder in a bank the liability of contributing an equal amount to the par value of his stock towards the payment of its debts *but once.* If once paid, he is discharged.

It cannot be material to the creditors what methods are employed for the production of the money, under what section of the statute the proceedings are had, or whether it is produced without *any* formal proceedings. It may be voluntarily paid.

VI.

Proceedings under Sect. 5205 may be substituted for the enforcement of the statute liability under the authority of Sect. 5234, in cases where the stock is already wholly lost, if the stockholders consent to it. Sect. 5205 was not intended to increase the burden upon the stockholder, but to furnish a new mode of relieving himself from it.

VII.

If the payment by the stockholders was by virtue of proceedings under Sect. 5205, and was made for the sole purpose of restoring the impaired stock, they acted under a gross mistake as to the value of the assets, and the payment could not have the intended effect. The money was, therefore, *in fact* paid solely for the benefit of creditors, and appropriated to the payment of debts, from which no repair of stock resulted, and the stockholders should be discharged from further liability. Relief is granted in equity against mistakes. This mistake was produced by false representations of the condition of the bank made by its officers and the officers of the government, who were then in possession of the bank.

1 Story's Eq., Sect. 140.
2 Pomeroy's Eq., Sects. 849 and 852.
Bank of Hindustan v. *Alison*, L. R. 6 C. P. 54.

VIII.

Had the motive and purpose of the appellants' payment been to make good the capital stock, that purpose has wholly failed. They have received no benefit. But *the fact remains*, that the money was paid towards the debts of the bank, and the creditors alone have the benefit of it.

A second payment cannot, therefore, in equity, be required of them.

Equity resists double benefits wherever it is possible.

IX.

Payments upon assessments made to repair deficiency in cap ital stock, under Sect. 5205, are upon condition that the whole

capital contributes, and the money is held by the bank or its officers in trust until that is accomplished. If applied to payment of debts before, creditors take it charged with the trust, and equity will require them to credit it on account of the statute liability of the stockholders.

Only a part of the stockholders in this case paid the assessment.

See

Marine Bank v. *Fulton Bank*, 2 Wall. 256.
Scammon v. *Kimball*, 92 U. S. 362, 370.
National Bank v. *Insurance Co.*, 104 U. S. 54.

X.

Stockholders are only required to contribute to a fund for the payment of debts, — not *to pay* them.

Their obligation is discharged if they pay the money to the officers whose duty it is to pay the debts, whether they are officers of the bank or of the government.

Appellants' assessments were paid to the bank examiner, who was then in possession.

March 18, 1882, by authority of the Comptroller, the fund was delivered to the officers of the bank, to be by them applied to the payment of debts. It was all so applied prior to May 20, 1882, subsequent to which no debts were contracted by the bank. All creditors have, therefore, received their share of the fund.

But whether creditors who became such subsequent to March 18 received any of this fund cannot affect the appellants' liability. They are not responsible for its distribution.

The officers of the bank are not the agents of the stockholders for this purpose. The obligation of the stockholder is performed when he places his contribution in the hands of those upon whom is the duty and responsibility of distribution.

Sawyer v. *Upton*, 91 U. S. 56, 60.
Patterson v. *Lynde*, 106 U. S. 519.
Smith v. *Hurd*, 12 Met. 371.
Thompson's Liability of Officers and Agents of Corporations, pp. 352, 461.

When the bank was opened March 18, by permission of the Comptroller, the debts were not paid or secured, and the bank was in the struggle to raise funds for this purpose.

It is not like the case of a bank that has been made solvent by the stockholders paying one hundred per cent upon their stock, and then gone on in business to make money *for them*.

The scheme of opening its doors to business was to assist in paying its debts by making money as the directors hoped.

This was done without appellants' authority, and they cannot be held for its consequences. If new debts were thus contracted which received no part of the fund to which appellants contributed, they are not liable for them.

XI.

There was no legal increase of the capital stock from $500,000.

[Reasoning and authorities will be found under point 1, for plaintiffs in error.]

The assessment by the Comptroller upon the new stock was clearly illegal, and the amount of the voluntary payment upon it being made for the express purpose of paying debts, should be allowed as such payment in set-off to the appellants' liability on their valid stock, if it is not otherwise satisfied.

XII.

If the Comptroller makes an unlawful assessment, or a receiver attempts to enforce one, "a court of equity, if its aid is invoked, will promptly restrain him by injunction."

United States v. *Knox*, 102 U. S. 422, 425.
R. S., Sects. 718 and 719.
Rule 55.

Statement of Points for Plaintiffs in Error.

I.

There was no legal increase of the capital stock from $500,000.

The directors took the proper action, Sept. 13, 1881, to increase it to $1,000,000. This was never all taken.

Increase of capital stock is invalid, unless all is taken and paid in.

R. S., Sect. 5142.

Plaintiffs in error subscribed and paid for a certain number of shares of said proposed increase. Certificates were issued to them for that amount. This issue of capital stock was void, because in violation of the statute, and could not be made valid by any subsequent action of the plaintiffs in error.

Scovill v. *Thayer*, 105 U. S. 143, 149.

Creditors are bound to take notice of its illegal character.

Ib., 151.

Zabriska v. *Railroad Co.*, 23 How. 141.

The action taked by the directors and Comptroller in December, 1881, relating to the increase of stock, was illegal. It neither diminished nor increased the stock. If it could be held an increase, no part of it was ever subscribed or paid in. It was an unsuccessful attempt to defraud the subscribers to the $500,000 increase, by holding them as stockholders to a less increase without their consent, for the purpose of making them pay a hundred per cent upon it as stock towards the liquidation of the liabilities of the bank, which was then insolvent and in the hands of the government.

The bank was insolvent Sept. 13, 1881, when the $500,000 increase was voted. It publicly failed and went into the hands of the Comptroller of the Currency, Nov. 18, 1881. Dec. 13, by an agreement with the Comptroller, the directors made an attempt to reduce the stock to $961,300. Such is the plain import of their vote. It expressly declares that "$38,700 of said stock be and is hereby cancelled and *deducted* from said capital stock of $1,000,000." This was illegal, as it required a two-thirds vote of the shareholders.

R. S., Sect. 5143.

If such is not the interpretation of the vote, it is without meaning. True, they proceeded upon the false theory that the capital had been increased to $1,000,000; but as this was the basis of their action, the action falls with the theory.

Their assertion that "the paid-up capital amounts to $961,300," can only be justified upon the theory that they supposed the vote of Sept. 13, *ipso facto*, raised the capital to $1,000,000; as, if they had understood that the capital was not raised until the whole amount was paid in, they could not have treated the subscription of $961,-300 as capital *at all*.

In their vote the directors assume that the whole capital is $1,000,000. Calling the $500,000 increase "new stock," they then distinguished between "paid-up capital" and capital not paid up.

Their whole action was a mistake; and because it was a blunder, to try to make it mean something in *direct conflict* with its express terms and whole scope, does violence to the plainest rules of construction, for the purpose of accomplishing that which must be admitted to be a great hardship, if not a gross wrong, upon the plaintiffs in error.

The certificate of the Comptroller is not conclusive evidence of an increase of the capital stock.

R. S., Sect. 5142, declares that "no increase of capital shall be valid" until three things are made to appear: (1) that "the whole amount of such increase is paid in"; (2) that "notice thereof has been transmitted to the Comptroller of the Currency"; (3) that the Comptroller's certificate has been obtained, "specifying the amount of increase of such capital stock, with his approval thereof, and that it has been duly paid in, as a part of the capital of such association."

If it appears, as in this case, that the whole amount of the increase voted has never been paid in, the certificate of the Comptroller is not conclusive evidence of the increase, because evidence of such payment is a condition precedent to the authority of the Comptroller to issue such certificate. A Comptroller's certificate proved to be false cannot bind the subscriber to the proposed new stock. It would be a fraud upon him.

The statute makes the Comptroller the judge of the evidence showing the due organization of a bank, and authorizes him to decide when the bank shall commence business; and his certificate in that respect, therefore, is conclusive.

R. S., Sects. 5168, 5169, 5170.

But as to the increase of the stock, certain facts must be made affirmatively to appear as we have shown, the certificate of the Comptroller being only one of those facts. The findings and certificate of the Comptroller relating to the authority of a bank to commence business, to the necessity and amount of an assessment of the stock to pay debts, and some other matters relating to the proceedings in liquidation and insolvency, have been held conclusive; but no authority is found to the effect that his certificate that the stock has been duly increased is conclusive.

II.

There is no ground for the assertion against the plaintiffs in error of the doctrine of estoppel.

Estoppel rests in fraud, resulting from some act or negligence of the defendants, by which the creditors were deceived, and induced to trust the bank.

It does not appear that any creditor trusted the bank by reason of the plaintiffs in error holding themselves out as stockholders. Before they can be estopped to deny their ownership of new stock upon this ground, it must appear that they held themselves out as stockholders, and that this fact was known to some creditors who trusted the bank in consequence of it.

Fox v. *Clifton*, 6 Bing. 776, 794 (19 E. C. L. 347, 355).
Thompson's Liability of Stockholders, Sect. 174.
Bank of Hindustan v. *Alison*, L. R. 6 C. P. 54.
Same case in Exchequer, *Ib.*, p. 222.
Bigelow on Estoppel, pp. 480, 536, 537, 538, 557 to 559, 560 to 565.
Pickard v. *Sears*, 6 Ad. & El. 496.
Freeman v. *Cook*, 2 Ex. 654.
In re Bahia & San Francisco Ry. Co., L. R. 3 Q. B. 584.

The new stock never had any legal existence, and notwithstanding it was subscribed and paid for as such, and certificates issued, as it never became legal stock, the question of estoppel cannot arise. Estoppel can only arise against one alleged to be a stockholder,

where the stock actually exists, and the question is whether the defendant has so conducted as to preclude himself from denying its ownership.

Bank of Hindustan v. *Alison*, L. R. 6 C. P. 222, in Exchequer Chamber.
Scovill v. *Thayer*, 105 U. S. 143, 149.

III.

Stockholders are only required to contribute to a fund for the payments of debts, — not *to pay* them.

Their obligation is discharged if they pay the money to the officers whose duty it is to pay the debts, whether they are officers of the bank or the government.

Plaintiffs' assessments were paid to the bank examiner, who was then in possession.

March 18, 1882, by authority of the Comptroller, the fund was delivered to the officers of the bank, to be by them applied to the payment of debts. It was all so applied prior to May 20, 1882, subsequent to which no debts were contracted by the bank. All creditors have therefore received their share of the funds.

But whether creditors who became such subsequent to March 18, 1882, received any of this fund cannot affect the plaintiffs' liability. They were not responsible for its distribution.

Neither the Comptroller, examiner, nor the officers of the bank are the agents of the stockholders for this purpose. The obligation of the stockholder is performed when he places his contribution in the hands of those upon whom is the duty and responsibility of distribution.

Upton v. *Tribilcock*, 91 U. S. 45, 47.
Patterson v. *Lynde*, 106 U. S. 519.
Smith v. *Hurd*, 12 Met. 371.
Thompson's Liability of Officers and Agents of Corporations, pp. 352, 461.

When plaintiffs' assessments were paid to Needham, he was the agent of the Comptroller, and was in possession of the bank as the

agent of the creditors. His relation to them for the time being was like that of a receiver, who is the representative of the creditors.

Case v. *Terrell*, 11 Wall. 199.

As such agent, his reception of a voluntary payment of the hundred per cent from a stockholder, with the assurance that it would relieve him from further liability, would be a discharge of such liability upon the ground of either contract or estoppel.

Morse on Banks and Banking, on p. 503, says: "The liability of each stockholder is for his share of the total indebtedness of the bank, not for his proportion of each item thereof." This view is supported in *United States* v. *Knox*, 102 U. S. 422, 425.

If, therefore, a stockholder pays a sum of money which is his ratable proportion of the indebtedness of the bank, or the full amount of his possible liability (one hundred per cent on his stock), to any person authorized to receive it in behalf of the creditors, his responsibility is at an end.

Needham was authorized as the representative of the creditors to receive such payment; and if made to him or to any other person by his authority, it was satisfaction of such stockholders' liability.

If in a subscription to capital stock of a corporation, the subscriber should agree to pay such assessments upon his subscription as the directors might make, but, without waiting for assessments, should pay the amount of his subscription into the treasury of the company, would not such payment be pleadable in bar of a suit upon assessment made after the payment?

Again, if after the appointment of a receiver, it appearing that an assessment would become necessary, the receiver should accept payment from stockholders of an amount equal to their shares of stock, without waiting for an assessment, would not such payment be a bar to a suit upon a subsequent assessment by the Comptroller?

IV.

If in an action at law motive is immaterial, and the motive of the plaintiffs' payment was to make good the capital stock, that purpose has wholly failed. They have received no benefit. But *the fact*

remains that it was paid towards the debts of the bank, and the creditors have the money thus paid. A second payment cannot, therefore, be required of them.

V.

No such register or list of shareholders as is required by Revised Statutes, Sect. 5210, was ever kept by the Pacific Bank. It is only such a list as is provided in that section that is "subject to the inspection of creditors." No record of shareholders in this bank, which creditors were entitled to see, contained the plaintiffs' names as stockholders. They do not appear on the record of transfers of stock.

The stock ledger is not such a list as creditors are entitled to see, under Sect. 5210, but is simply a private book of accounts between the bank and its stockholders, who alone are entitled to see it. The president and cashier had no right, either express or implied, to enter the name of any subscriber to the new stock upon a list kept for the benefit of creditors, before the proceedings to perfect that increase had been completed.

Actual knowledge that the plaintiffs' names were upon such a list as is required by Sect. 5210 must be shown before they can be charged as contributors towards the debts of the bank on account of such entry. No estoppel (which rests in fraud or negligence) could arise without such actual knowledge. But in the cases at bar there was no such list, and no authority to make one, as the $500,000 increase was never perfected.

ALBERT P. GOULD.
BENJAMIN N. JOHNSON.

118-634

Office Supreme Court, U. S.
FILED
OCT 11 1886
JAMES H. McKENNEY,
Clerk.

United States Supreme Court.

Nos. 789, Eq., 820, Law.

JOHN P. DELANO, *Appellant and Plaintiff in Error,*

v.

PETER BUTLER, *Receiver.*

GENERAL STATEMENT.

There is no dispute in these cases as to the truth of each and every allegation contained in the declaration, except as to the amount of stock for which the plaintiff in error is liable, under the assessment. He admits thirty shares, and denies thirty. He is found to own all. (Law Rec., pp. 8, 12, 13–15, 60, 61.)

There is no dispute as to the fact that when the bank became permanently insolvent, and passed into the hands of a receiver, the plaintiff held, and for six months or so prior had held, certificates for, and was registered in the stock ledger of the bank as the absolute owner of, all the shares declared on, and for all of which he had subscribed and paid the money to the bank. (Law Rec., pp. 59–61.)

These facts furnish the most absolute and complete proof of ownership possible; and the court below found the same, of course.

The defence rests on this state of facts. The directors on Sept. 13, 1881 (Rec., p. 8), voted to increase the capital stock from $500,000 to $1,000,000 (the limit prescribed in the article of association), giving the old stockholders the prior right to take the same at par, as bound by law to do; and Mr. Delano, upon notice thereof, proceeded, separately, to take his quota, subscribed for, and paid for the same, on Sept. 16, 1881, accepting the certificate issued therefor, dated Oct. 1, 1881 (Rec., pp. 59–61), and he was thereupon registered as the owner in the stock ledger of the bank (p. 61). Only $461,300 of the new stock being subscribed and paid for, the directors, on Dec. 13, 1881 (the bank having meanwhile lost its capital and suspended business), proceeded, without Mr. Delano's

actual knowledge and consent, to change the amount of the proposed increase of capital stock to $461,300, and then for the first time got the approval and certificate of the comptroller of the currency, fixing the capital at $961,300 accordingly. (Rec., p. 50.) The comptroller notified the bank on Dec. 16, 1881, by request of the bank directors (Rec., p. 31), that the deficiency in the capital stock must be made good by an assessment on the stockholders, or the bank go into the hands of a receiver. (R. S., § 5205.) On Jan. 10, 1886 (pp. 11, 43, 45), the stockholders accordingly voted the assessment; and $742,800 of the amount ($961,300) was subsequently paid. Mr. Delano did not attend the meeting, but paid his quota upon notice. He paid it on the advice of Arthur Sewall, a stockholder and director, and without knowledge of the change in the amount of increase of capital stock first voted, and supposing and believing that the whole amount had been paid, and the new stock all taken, and the increase effected accordingly, in conformity to the law, and with an assurance from Mr. Sewall that there would be no further personal liability. (Law Rec., pp. 59–61.) The bank, because of the assessment being supposed to render the bank solvent, was allowed to, and did, resume business on March 18, 1882, and continued in business till May 22, 1882, contracting new debts (Law Rec., pp. 12–14), when it became or was found to be hopelessly insolvent, stopped business, and passed into the hands of a receiver to be wound up.

The adverse contention is: (1) that Mr. Delano was not a stockholder *quoad* the thirty shares of new stock; (2) that the payment of the voluntary assessment extinguished or satisfied in law and equity the personal liability.

ARGUMENT ON THE LAW.

The directors had full power and complete authority for what they did, and there is no ground for any contention that the increase of the capital stock was *ultra vires* either of the association or of the directors.

Rev. Stats, §§ 5142, 5143.
Articles of Association, Nos. 5, 6.
By-Law, No. 11.
Railway Co. *v.* Allerton, 18 Wall. 233.

Being invested with full power in the premises, they had a right to make the modification or change which they did in the amount of the increase of the capital stock first proposed, the proceedings

being inchoate until the whole amount of the voted increase had been subscribed and paid for, and the approval of the comptroller of the currency was obtained.

Charleston *v.* People's Nat. Bank, 5 (Rich.) So. Car. 103.

Not being *ultra vires*, Mr. Delano cannot be allowed to set up a plea of nullity because of any irregularity or informality in the proceedings to increase the capital stock.

Scoville *v.* Thayer, 105 U. S. 143.
Upton *v.* Triblecock, 91 *id.* 45.
Chubb *v.* Upton, 95 *id.* 665.
Pullman *v.* Upton, 96 *id.* 328.

If persons dealing with a corporation give credit on the security of the capital represented by an issue of shares, without having notice either actual or constructive that the shares were issued illegally, they would be entitled to charge the holders of those shares with liability, whether the corporation could do so or not.

Scoville *v.* Thayer, *supra*, accords with this doctrine, as the Public Statutes carried such notice. Not so where the illegality alleged rests on By-Laws.

Mr. Delano, having paid for the new stock and accepted and held the certificate with all the incidental rights of ownership, is estopped from denying ownership.

Sanger *v.* Upton, 91 U. S. 56.

By taking the certificate issued, he impliedly authorized the registry of the ownership, and the holding out of the same thereafter to the public.

Webster *v.* Upton, 91 U. S. 65.
Re Rec. Bk., 22 N. Y. 17.

He cannot now be permitted to gainsay the ownership, the creditors having been justified in relying upon the apparent ownership.

Casey *v.* Galli, 94 U. S. 679.
Davis *v.* Stevens, Brown's Nat. Bk. Cases, 158.
Bowdell *v.* F. & M., Nat. Bk. *id.* 146.
Davis *v.* Essex Baptist So., 44 Conn. 582.
Irons *v.* Man. Nat. Bk., The Reporter for July, 1886, p. 69.
Adderly *v.* Storm, 6 Hill, 624.
Johnston *v.* Laflin, 103 U. S. 800.
Re Reciprocity Bk., 22 N. Y. 17.

Formalities prescribed by the charter or by the By-Laws may be waived.

So strict is this rule of law that fraud, by which a third party (not then a stockholder) is induced to subscribe for stock in a corporation, is not available as a defence to a suit to recover on the subscription, especially if vigilance and due diligence are not shown to discover the fraud, and prompt steps taken to repudiate; and, in no case, where repudiation had not occurred before the winding up order was made.

Ogilvie *v.* Knox Ins. Co., 22 How. 380.
Upton *v.* Triblecock, 91 U. S. 47.
Chubb *v.* Upton, 95 U. S. 665.
Payson *v.* Withers, 5 Bliss. 269.
Oakes *v.* Turquand L. R., 2 H. L. 325.
Stone *v.* City & C. Bk., 3 C. P. Div. 307.
Wright's Case, L. R. 7 Ch. Ap. 60.
Henderson *v.* Royal B. Bk., 7 El. & Bl. 356.
Daniel *v.* R. B. Bk., 1 H. & N. 681.
2 Morawetz on Corp., §§ 839, 840, notes.
Houldsworth *v.* City of Glasgow Bk., 5 Appeal Cases, 317.

The statute of England only voices the law without it, in making the registry conclusive. To mitigate the doctrine, provision has been made for the removal of a name from the registry, when there wrongfully. Earl Cairns, L. C., says (5 Appeal Cases, p. 322): "It was admitted before your lordships, as indeed it could not be denied, that, after the winding up of the company commenced, it was too late for the appellant to repudiate his stock, and that he must remain, as the liquidation found him, a partner in the bank and a contributary as such." Such seems to be the opinion of the dissenting justices in the case of Upton *v.* Triblecock, *supra.*

The grounds on which the doctrine of the English and American cases rests are well stated in Stone *v.* City & Co. Bk., 3 C. P. Div. 307, and in 2 Morawetz on P. Corp., § 839, note c. And what the court say in Casey *v.* Galli is applicable as to the registry.

SWAYNE, J. "While a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation and is sued upon the contract, neither is permitted to deny the legal existence or the legal validity of such a corporation. To hold otherwise would be contrary to the plainest rules of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position which they

assume. They are estopped to deny the reality of the state of things which they have made appear to exist, and upon which others have been made to rely. Sound ethics require that the apparent, in its effects and consequences, should be as if it were real; and the law properly so regards it."

Same principle applies to the increase of capital stock, as that is only, in legal effect, an amendment to the charter.

The law, as held in the cases above cited, was in cases founded on a subscription. It applies with equal and greater force in the cases at bar, where it is sought to get rid of a liability which exists, as between the stockholder and the creditor, and for which alone the receiver can sue, as the representative of the creditor, and which rests on no obligation which the bank could enforce.

Hawthorne *v.* Calef, 2 Wall. 10.
Curran *v.* The State of Arkansas, 15 How. 304.
Irons *v.* Man. Nat. Bk., The Reporter, July, 1886, p. 69.

Action between the directors and the stockholders, if wrongful, cannot be allowed to lessen the capital or the personal liability secured as a trust fund in behalf of the creditors. Even conditions attached to subscriptions cannot be allowed to do this (Burke *v.* Smith, 16 Wall. 396). In Chubb *v.* Upton, *supra*, the court sanction the doctrine of Rens. & W. P. R. Co. *v.* Westel, 21 Barb. (N. Y.) 56, that it is no defence to an action on a subscription that all the amount required by the articles of association was not subscribed.

When the absolute subscription was made, the claim for it became a part of the assets of the bank, and no implied condition could be attached to it.

County of Morgan *v.* Allen, 103 U. S. 498.

A fortiori no implied understanding could vitiate the stock after the subscription had been complied with by payment, and the stock had been issued and entered to the credit of the taker in the stock ledger. Upon plaintiff's own assumption that all the new stock first voted had been taken, they must be conclusively presumed to have known that this had occurred as the law absolutely required it to be done.

The capital stock and the personal liability of the stockholders are pledged as security for the creditors.

2 Morawetz, § 820, note 2, 3.
Hatch *v.* Dana, 101 U. S. 205.
Sawyer *v.* Hoag, 17 Wall. 623.
Hawthorne v Calef. 2. Wall. 10

In the last case cited.

MILLER, J. "This artificial body is but the representative of its stockholders, and exists mainly for their benefit, and is governed and controlled by them through the officers whom they elect. The interest and power of legal control of each stockholder is in exact proportion to the amount of his stock. It is therefore but just that, when the interest of the public, or of strangers dealing with this corporation, is to be affected between the stockholders who own the corporation and the corporation itself, such transactions should be subjected to a rigid scrutiny; and, if found to be infected with anything unfair toward such third person, calculated to injure him, it should be disregarded or omitted so far as it may inequitably affect him."

Even if there had been fraud (none is found) on the part of the directors in inducing the stockholder to take this new stock, that would not avail, save as a ground of action against the perpetrator of it.

The stock was voidable only, and not void; and this, if fraud was perpetrated, was on ground arising within the family of stockholders, and could not affect the innocent creditor.

Not being avoided before the winding up order, Mr. Delano was a stockholder within the provisions of Rev. Stats., § 5151.

Oakes *v.* Turquand, *supra.*
Houldsworth *v.* Glasgow Bk., *supra.*

Mr. Delano was bound to take cognizance of the existing contingencies when he took his stock, and look out for what the validity of the increase of the capital stock depended on. He did not do so, but pleads only simple ignorance, without inquiry shown or investigation made. He knows of the suspension and resumption, the vote to assess on the part of the stockholders, and pays the assessment, and participates in the chances and prospects of the future of a resuscitated and rehabilitated bank. And a large majority of the stockholders voted for the assessment, and paid $742,800 of the $961,300. His mouth should be shut now that disaster has come instead of success.

That which the stockholders ought by proper diligence to have known, they may be presumed to have known in any contract between the corporation and those who are justified by the circumstances in dealing with the bank upon the basis of the same.

But, lastly, the action and certificate of the comptroller of the

currency, sanctioning and approving of the increase of the capital stock, conclude Mr. Delano, on that subject.

Casey *v.* Galli, 94 U. S. 679.
Cadle *v.* Baker, 20 Wall. 650.
Kennedy *v.* Gibson, 8 *id.* 498.
Affirmed in U. S. *v.* Knox, 102 U. S. 426.

EQUITABLE SATISFACTION.

We come, now, to the alleged equitable satisfaction. There is nothing in that contention. No one can contend, with any show of plausibility, that the voluntary assessment authorized by the statute (Rev. Stats., § 5205), and expressly made and paid, in pursuance of a notice from the comptroller of the currency given at the instance of the bank (p. 30), for the specific purpose of making good a deficiency in the capital stock lost, and when the object of the same was accomplished, operates either in law or equity to affect the personal liability of the stockholders by reason of Rev. Stats., § 5151.

The payment of a voluntary assessment made for such a purpose was never intended to supersede or to satisfy the personal liability. Otherwise, in case of a bank's lost capital being restored thereby, so as to enable it to go on in business as a solvent association, there would be ever afterward the anomaly, under the national banking system, of such an association doing future business without the security furnished as a pledge to creditors, present or to be. It makes no difference in principle whether the bank thus circumstanced continues in business two months or ten years. The voluntary assessment is to be and was, in the present instance, paid on account of, and was thereafter invested in, and represented by, the shares and the certificates thereof. The personal liability is expressly made as an *addition to what is invested in the shares of stock*. In the present case, the payment of the voluntary assessment was indorsed on the certificates as paid thereon (p. 60).

The law pledges to the creditor a trust fund, consisting of the capital stock and the personal liability, as security for depositors and creditors, one as much as the other.

Sanger *v.* Upton, 91 U. S.
2 Morawetz on Corp., § 820 and notes 2, 3; § 869, notes.
Hawthorne *v.* Calef. 2. Wall. 10

The personal liability proved can be collected and administered, in case of a winding-up order, by the receiver only, acting under the orders of the comptroller of the currency. In case the bank goes

into voluntary liquidation without a receiver appointed by the comptroller, the creditor may sue directly (Irons *v.* Man. Nat. Bk., The Reporter for July, 1885, p. 69). Payment to the bank is a payment to a party not entitled to collect the money, and is no satisfaction.

Wright *v.* McCormack, 17 Ohio St. 86.

The adverse contention would exclude the creditors who became such after the resumption. These debts were $2,338,617.20 in new deposits, and $200,000 of new liabilities outstanding at the time of the ultimate failure (Rec., p. 14). $223,500 of the voluntary assessment had never been paid, a portion of the stockholders being delinquent. Some of the old creditors had been paid nothing; and some had sued, and got security by means of property of the bank pledged to secure bondsmen who had signed bonds as sureties in the process of dissolving attachments (Rec., p. 13). Some extended the time in which the debts due them from the bank were to be paid. Others did not (Rec., p. 13), the relative positions of the creditors being thus changed. The bank was held out to the public and to the depositors and general creditors as having been put into a solvent condition by means of the voluntary assessment, and creditors dealt with the bank thereafter on that assumption (Rec., pp. 56–60).

There is, therefore, no general equity in the claim made adversely. There is no such double benefit as equity abhors, and will prevent, if possible. As well said by Colt, J., in Morrison's case in equity (Equity Case, p. 100), in a clear, clean, and exhaustive, opinion: "The double benefits which equity abhors must be to the same recipients; but we cannot conceive how the payment of some creditors in full can be an equitable satisfaction of the legal claims of other creditors who consented to an extension to save the bank, and of new creditors who made deposits after the bank resumed."

We do not notice the facts found relating to the opinions expressed, the advice and assurances given, on the part of third parties, or the supposition and opinions of the plaintiff in error, in regard to the effect of paying the voluntary assessment (Rec., p. 60). They clearly cannot operate to change the law or to affect its operation.

Upton *v.* Triblecock, 96 U. S. 45.

If there was any such mutual mistake as would entitle the party to recover the money, the claim must be presented and proved be-

fore the receiver, like other indebtedness existing at the time of the final failure. If he *understood*, as he says he did (Rec., p. 61), "that the effort was to pay the liabilities of the bank, and after that the stockholders would do as they chose about continuing in business," supposing at the same time "that the bank would come out better than it would in the hands of a receiver," and that "he was liable in law to pay the assessment," he cannot now justly complain because his anticipations were not realized. The appointment of a receiver being then prevented, and the bank allowed to resume with his knowledge, he voluntarily took the chances of that resumption.

SPECIFIC EXCEPTIONS.

We now come to the requests for rulings and to those denied.

The court has only to say whether, upon the state of facts specially found, the receiver was entitled to recover. Everything else which is material being placed beyond dispute except the ownership of stock, as alleged, and the court having found that as a fact specifically (Rec., p. 61), the court below must be found to have erred in some matter of law vitally affecting this finding of fact. If anything appears which concludes the plaintiff in error on this issue, then the court need not go further, except to pass on the questions raised as affecting other cases pending below, and for which the present with the others before this court may answer as test cases. The general requests made are only matters and points in detail embraced in the general discussion already had, and in the comprehensive ruling made at the close (Rec., p. 66). We need not consider all the requests in detail, therefore, further than to say that we controvert them, each and every one of them. They are defective in their assumptions of fact, not being sufficiently comprehensive. The court could very properly decline to rule on them specifically, and make the comprehensive ruling, which he did make on the general request, that there could be no legal recovery on the facts found.

No erroneous ruling or refusal to rule, which did not prejudice the rights of the party against whom the ruling was made, is sufficient cause to set aside the judgment.

Lancaster *v.* Collins, 115 U. S. 222.

No erroneous admission of evidence, which is simply irrelevant or immaterial and does not clearly effect the result prejudicially, can operate to disturb a verdict, and much less a finding on the part of the court. (Mining Co. *v.* Taylor, 100 U. S. 37.)

This brings us to the exceptions under that head.

The letter of the cashier and the certificate of the comptroller (Rec., pp. 60–62) were official papers, required by statute (Rev. Stats., § 4152), and were manifestly competent evidence (Rev. Stats., § 884).

There can be no doubt about the vote of the directors of Dec. 13, 1881 (Rec., p. 62). The effect thereof afterwards was a matter of law.

The evidence, relating to suits brought and the dissolving of the attachments (Rec., p. 63), was designed to show the changed condition of the creditors, and an inequitable use of the money collected on the voluntary assessment, and, like Exhibits 14, 15, 16, 17, also, were competent as affecting the alleged equitable satisfaction set up. They are simply irrelevant and immaterial in any other aspect.

All the other exhibits objected to, except Exhibit 11 (the record of the stockholders' meeting), are official communications, involved in, and pertaining to, the transactions in question as a history of the same, of little or no account except as bearing upon the question of good or bad faith. That issue was first opened, but was finally abandoned at the close of the suit, no claim of fraud then being made or proved or used in any request as an assumption of fact. The evidence became then for the first time immaterial and irrelevant, except so far as it might affect the alleged equities. Before that time there was no impropriety in rebutting any alleged bad faith on the part of the acting parties.

Exhibit No. 11 was competent, and is conceded to be so by the plaintiff in error, so far as it shows the choice of directors; and that put the record in evidence, all else as to its effect when in being a question of law. It was, however, competent, as the case was being tried, for other reasons. 1. It tended to show a ratification of the increase of the capital stock on the part of a large majority of the stockholders, an assessment being voted on both the old and new stock, and which was subsequently paid to the extent of $742,800. (Sewall's Case, 3 Ch. 131.) 2. It showed what the assessment laid, was, and what it was for, as voted. This affected the equitable satisfaction claimed. 3. What occurred at the meeting and what was disclosed affected those present with knowledge; and the record of the same was a means of knowledge for those not present, to which they were bound to resort in the exercise of due diligence.

The competency of the record is not affected by any defect in the notice, as alleged, because the stockholders, voting, or paying without objection, waived all that. The validity of the assessment, as one which could legally be enforced, was not essential to the purposes of this suit. This becomes, however, simply immaterial and irrelevant in the view of the case as hereinbefore presented on issues of law and fact touching the question of ownership of the new stock.

OBJECTION OF THE DEFENDANT IN ERROR.

In the equity suit (pp. 17, 18) is a piece of evidence, agreed upon subject to objection as to its competency, in the shape of extracts from another bill in equity brought formerly by the receiver, seeking to charge the directors for losses occasioned the stockholders and creditors by their alleged neglect and malfeasance, and sworn to. Other portions of the bill appear on page 72. The law case was tried and submitted on the same agreement and record of evidence found in the equity suit. In trying the action at law, the said extracts were offered in evidence by the plaintiff in error, objected and excepted to by the receiver as incompetent evidence, and a paragraph, found on page 18 of the record in the law case, is taken verbatim from the record in the corresponding equity suit. The receiver's exception was not reported, because the judgment was in his favor, and it was unnecessary; and the point is therefore not open in the action at law, but it is raised and open in the suit in equity.

Inasmuch as cases are pending in the court below, it is desirable to have the court determine now the competency of the evidence; and it can be done in the equity suit, as well as to decide whether fraud, if proved, would be any defence. The latter point has been already argued.

We submit that the extract is incompetent in evidence, as the admission of the receiver. It contains only an alternative charge made by the receiver, *non sui juris*, and as the representative and in behalf of the stockholders now seeking to avail themselves of it.

1 ~~General~~ Greenleaf Ev., § 212; 3 *id.*, § 274, notes.

It does not prove fraud, and the court has found none. The finding is not that any misstatement was made or concealment practised fraudulently. It does not appear what they consisted of, or that Delano was induced by them to act to his hurt. They were between fellow-stockholders, and cannot affect innocent third par-

ties; while the wrong-doer may be sued and held liable. No fraud can therefore be found as an inference of law, as that matter, if open and made the subject of contention in the trial below, was covered by the finding of ownership in the stock, and by the general ruling in denial of the general request that embraced within its scope the matter of vigilance, due diligence, ratification, and want of repudiation, as to any one of which there is no special exception in matter of law.

A. A. RANNEY.

118-634

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, A. D. 1886.

No. 789.

JOHN P. DELANO, *Appellant*,

vs.

PETER BUTLER, *Receiver*.

No. 820.

JOHN P. DELANO, *Plaintiff in Error*,

vs.

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ARGUMENT FOR DELANO.

Opinion Job Press, Rockland, Maine.

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ARGUMENT FOR DELANO.

EQUITY.

I.

The obligation imposed upon the plaintiff by the statute, has been equitably performed, by his voluntary contribution of an amount equal to the par value of his stock, towards the payment of the debts of the bank.

"All contracts, debts, and engagements," in Sect. 5151 of the Rev. Stat., means, *every species* of contract, debt, and engagement—not each separate contract, debt and engagement.

A reasonable construction of the statute, requires only, that each stockholder in a bank which has become insolvent, shall contribute a sum equal to the par value of his stock, towards a fund for the payment of its debts.

Terry v. *Little*, 101 U. S. 216, 218.

Any other construction would make the statute unnecessarily burdensome, and compliance with it, difficult, if not impossible.

The Pacific National Bank failed Nov. 18, 1881. It was then insolvent owing nearly three million dollars more than the value of its assets.

May 20, 1882, when Price took possession, the debts exceeded the assets about two million dollars, as he then valued the assets, which he has since discovered to be of less value than he then supposed. To this is to be added the amount of $742,800 contributed by stockholders after the failure and before May 20, 1882; making a total of $2,742,800 debts, in excess of the value of the assets, at the time of the failure.

The capital stock of the bank was then only $500,000, divided into shares of $100 each. It is claimed, that it was subsequently increased to $961,300; but this claim is contested.

At the time of the failure the plaintiff owned thirty shares of the stock. He had subscribed and paid for thirty shares of a proposed increase of the capital to $1,000,000; but the increase was never perfected and did not become valid under the statute; so that the plaintiff never owned but thirty shares of the stock, though he at one time supposed he would be held as owner of sixty shares, and acted upon that supposition.

The bank being insolvent, owing a large amount in excess of the whole value of its assets, including the sum for which the stockholders were liable, it could not be made solvent by the payment of that sum. The stockholders, therefore, might clearly in equity, discharge that liability by paying the amount required by the statute, towards the liquidation of the debts of the bank, without waiting for compulsory process against them.

The bank was placed in charge of Daniel Needham by the Comptroller of the Currency Nov. 18, 1881, and he took and retained possession of the assets, including the assessments paid by the stockholders, and had control of all the affairs of the bank, until March 18, 1882, and supervisory authority over them until the Receiver was appointed. (Eq. Record, p. 13.) His supervision, after the doors were opened, was, under the express direction of the Comptroller, to be continued until the assessment should be fully paid. (Eq. Record, p. 15.) This was not wholly accomplished when the Receiver was appointed.

January 23, 1882, the plaintiff paid to Needham $6,000 which was claimed to be his statutory contribution towards the payment of the debts of the bank. The money was in the possession or under the control of Needham until March 18, when, by permission of the Comptroller, it was allowed to pass into the hands of the officers of the bank, who used it in payment of its debts.

The money thus became a part of a common fund, which was raised for, and devoted to the payment of the debts of the bank.

To what particular debts it was applied, is not material to the plaintiff's case.

Money has no ear marks. If the money contributed by the stockholders was mingled with other moneys, devoted to the payment of debts, it is not material, as the whole fund was used in payment of "debts," and in the discharge of "contracts and engagements."

That the entire amount which was voluntarily paid by the stockholders was used to pay debts, is proved by the admissions of the respondent, under oath, and the books of the bank and is specially found by the Circuit Judge.

Eq. Record, pp. 17, 18.

Law Record, p. 13.

Payment by the stockholders of an amount equal to the par value of their stock, which was devoted to the payment of the debts of the bank, constituted an equitable performance of the obligation imposed upon them by the statute; or it may be regarded as an equitable satisfaction of that liability. The distinction between them is not very important. They both rest in the equitable principle of antagonism to double benefits.

The doctrine of equitable performance, is generally referred to the maxim, that, equity imputes an intention to fulfill an obligation. It has been well described by Pomeroy thus,—"when a person has definitely bound himself to do a certain act, by which a particular kind of thing will be bestowed upon another in a specific manner, and instead thereof he either bestows the same kind of a thing upon the obligee in a different manner, or else permits the same kind of a thing to devolve upon the obligee in course and by operation of law, so that what is thus done, or permitted, may amount to a complete or partial fulfillment of the existing obligation, then the party will be presumed to have done or permitted this with the

intention of performing the very obligation itself, in whole or in part; and the obligation will be thus wholly or partially performed, as the case may be. Equity imputes to the party an intention of fulfilling the obligation resting upon him, rather than the intention of violating that duty, or of conferring a bounty."

2 Pomeroy's Equity, Sect. 579.

Pomeroy in Sect. 578, clearly shows the distinction between satisfaction and performance. In summing up, he says, "In satisfaction, a different kind of thing is given with the intention that it shall be accepted as a substitution for, and in lieu of the benefit due by the terms of the original obligation; and the donee has, in general, a right of election. In *performance*, the same kind of a thing is either conferred in a different manner or is left to devolve by operation of law, thereby fulfilling the very terms of the original obligation."

A recent English author defines equitable performance thus, "The doctrine of performance arises rather from a construction which equity, in its regard for natural justice, puts upon certain circumstances, than from the implied intention of the party. It is not, therefore, subject to any of those rules which originate in the design of correctly ascertaining the party's intention. And it conspicuously differs from satisfaction as applied to debts, in that performance is commonly deemed to have been effected *pro tanto*."

Smith's Principles of Eq., p. 461.

The same author says, "The typical case of performance is, where a person covenants to do a certain act, this covenant is considered as performed by some subsequent act which wholly or approximately effects the same purpose,

though it does not expressly refer or precisely conform to the covenant." (pp. 461, 462.)

In the case at bar, the stockholders, by becoming such under the law, obligated themselves to pay, equally and ratably and not one for another, a sum of money equal to the par value of their stock, "for all contracts, debts, and engagements of the bank" if it shall become insolvent.

This obligation was equitably performed by the subsequent act of paying one hundred per cent upon their stock, and an appropriation of the money to the payment of debts. This accomplished the *purpose* of the obligation; and applying the doctrine of equitable performance, it is immaterial, whether at the time the money was paid, the party intended it as a performance of his obligation or not.

It rests in *the fact*, that *that has been done*, which the obligation requires. The law imputes to the obligor an intention to perform his duty, as a mode of escaping from that double benefit to the recipient, which equity abhors. We have in this case direct proof that such was the intention.

The object of the statute was, to secure to the creditors of an insolvent bank, in addition to its assets, a fund for the payment of debts, equal to the amount of its capital stock. This object was accomplished by the voluntary payment of that amount by the stockholders, and its application to that purpose, although, in raising, and in the payment of this fund, no reference was had to the statute mode of doing it, and although, it may not have been done with express reference to the obligation, or in precise conformity to the mode prescribed by the statute for its performance.

We would not be expected to find a case precisely like the one at bar, as probably no such state of things has be-

fore arisen, in a contest before the courts, between the creditors and stockholders of a National Bank; but principles of equity have been established, by decided cases, and by text writers upon the law of equity, which are broad enough to cover our case.

"Equity is ever reaching out and expanding its doctrine so as to cover new facts and relations, but still without any break, or change, in the principles or doctrines themselves." "The system is much more elastic and capable of expansion, and extension to new cases, than the common law. Its very central principles, its foundation upon the eternal verities of right and justice, its resting upon the truths of morality rather than upon arbitrary customs and rigid dogmas, necessarily give it its character of flexibility, and permit its doctrines to be enlarged so as to embrace new cases as they constantly arise." (1 Pom. sec. 59.)

The doctrine of equitable performance has been applied to a case where the obligation was imposed by an act of Parliament.

Tubbs v. *Broadwood*, 2 Russell & Mylne 487.

It was held in that case, that, "where a tenant for life sells part of the settled estate under the authority of an act of Parliament, which directs him to lay out the consideration money in the purchase of other lands, and to settle them to the same uses, and he afterwards purchases lands in fee simple to nearly the amount, but dies without having settled them accordingly, leaving them to descend upon his heir at law who was also the first tenant in tail in remainder under the settlement, a court of equity will *intend* that the purchase was made in performance of the obilgation imposed by the act, and will not permit the remainder-man to recover the value of the lands sold

against the personal estate of the tenant for life."

The court say, "It may be true, that this is the first time in which the doctrine of *Lechmere* v. *Lechmere* has been carried beyond the case of covenant; but the *principle* of that case is directly applicable to the present. The whole doctrine proceeds upon the ground, that a person is presumed to do that which he is bound to do; and if he has done anything, he has done it, in pursuance of his obligation."

The Lechmere case was this:—Lord Lechmere on his marriage covenanted to lay out £30,000, in the purchase of lands, with the consent of the Earl of Carlisle, and Lord Morpeth, to be settled on Lord Lechmere for life, remainder to the amount of £800 a year to Lady Lechmere for her jointure, remainder to his first and other sons in tail male, remainder to Lord Lechmere his heirs and assigns forever. Lord Lechmere afterwards purchased certain lands, but without consent of the trustees, and died without making any settlement of them. On a bill filed for specific performance, it was held, that the lands purchased after the covenant, ought to be considered as purchased in part performance of it; and it was decreed accordingly.

Lechmere v. *Carlisle*, 3 Peere Williams, 227.

The principle was applied to a case in which the covenant was to pay money to trustees to be laid out by them in a purchase of land, and the covenantor himself purchased the land, but died intestate without conveyance to the trustees. The Court held that the purchase was a *performance of the covenant*, and charged the estate with the trust.

Sowden v. *Sowden* 1 Brown Ch. 582; approved in *Lench* v. *Lench* 10 Ves. 516.

In *Wilcocks* v. *Wilcocks* 2 Vernon 558, a person covenanted on his marriage to purchase lands to the value of £200 a year, and to settle them for the jointure of his wife and to the first and other sons of the marriage in tail. He purchased lands of that value, but made no settlement; so that on his death the lands descended to his oldest son.

On bill for specific performance the Court held that the purchase of the land should be deemed a performance of the covenant. (2 Eq. Lead, Cas. 833, 4th Am. Ed.)

It has been held that performance may result from operation of law.

In *Blandy* v. *Widmore* 1 Peere Williams 323, a man covenanted, previous to his marriage, to leave his wife £620. He died intestate having made no settlement; but his wife's share of his estate under the intestacy was more than £620. It was held that the covenant should be deemed to have been performed, and that the widow could not claim her share under the intestacy and the £620 as a debt under the covenant.

See also

Deacon v. *Smith* 2 Atk. 323.
1 Pom. Eq. Sects. 420, 421.
2 Id. Sec. 580—1 Storys Eq. Sec. 1107.

Applying the doctrine of equitable performance as thus elucidated, to the peculiar circumstances of this case, we need not consider the intention of the stockholders in the payment of their contribution, to the fund for the payment of debts, either express or implied, as the principle may be invoked in their behalf without reference to it.

II.

Closely allied to the doctrine of equitable performance

is the principle of equitable satisfaction, where intention either express or implied is required.

The facts of this case will support the bill upon this ground also. Judge Story says, "Satisfaction may be defined in equity, to be the donation of a thing with the intention, expressed or implied, that it is to be an extinguishment of some existing right or claim of the donee. It usually arises in courts of equity, as a matter of presumption, where a man, being under an obligation to do an act, *as to pay money*, does that by will or gift, which is capable of being considered as a performance or satisfaction of it; the thing performed being *ejusdem generis* with that which he had engaged to perform."

2 Story's Eq. Sects. 1099, 1104.

And in Sect. 1104, he says, "The notion of satisfaction implies the doing or giving of something equivalent to the right extinguished."

Pomeroy says, "Satisfaction may be defined, in a general manner, to be the donation of a thing with the intention, either expressed or implied, that it is to be taken either wholly or in part extinguishment, by way of substitution, of some prior claim in favor of the donee."

1 Pom. Eq. Sect. 521.

In Sec. 520, he says, "If the person to whom, by an instrument of donation, a benefit is given, possesses at the same time, a previous claim against the donor, and an intention appears that he shall not both enjoy the benefit and enforce the claim, he cannot accept the former without renouncing the latter. The underlying principle which controls the case, is the same as that which governs election; under any circumstances the donee is required to actually elect between his original and his substituted

rights; while under others the satisfaction is complete, and the substitution is effected without the exercise by him of any actual choice."

In the case at bar the substitution is already effected, as the creditors have received and retain the benefit of the voluntary payment.

For the cognate doctine of election see

1 Pom. Eq. Sect. 461, et seq.

Smith, in his "Principles of Equity" p. 444, says,— "Equity often recognizes a principle known as the doctrine of satisfaction. It arises in cases where a donor, being already under some obligation to the donee effects a donation under circumstances which indicate an intention that this shall be taken in satisfaction of the prior obligation."

The intention of the recipient who has received and retains the benefit is not to be considered. In such case we look only to the intention of the donor, or person conferring the benefit; and this intention need not be expressed, but may be implied. In our case it is both. The recipient by the retention of the benefit, (the money, in this case) has made his election, and is not in equity entitled to a second benefit.

This principle finds its most common illustration, in cases where debts have been held to be satisfied by legacies and portions.

In Pye, Dubost, *exparte*, 18 Ves. 140, it is laid down by Lord Eldon as a general rule, that "where a parent gives a legacy to a child, not stating the purpose for which he gives it, he is understood to give a portion; and since equity regards double portions with disfavor, if the parent afterwards advances a portion on the marriage of the child

the presumption arises, that it was intended to be a satisfaction of the legacy, either wholly or in part."

So a portion may be satisfied by a legacy; as, where a portion, having been contracted to be given upon the happening of some event, such as marriage, is held to be satisfied by a subsequent legacy.

Hinchcliffe v. *Hinchcliffe*, 3 Ves. 516 is an illustration.

Here, also, the foundation of the doctrine is said to be, "the distaste with which equity regards double portions."

In *Thymme* v. the *Earl of Glengall* 2 H. L. cases, 131, a residuary bequest was held to be a satisfaction of a covenant to bestow a certain portion on a daughter.

The cases supporting the doctrine of "ademption" are very numerous, and need not be cited.

See 2, Redfield on Wills, (2 ed) p. 515, et seq. Sect. X; and Sect. XI, p. 525, and authorities in note.

III.

The stockholders who have paid their hundred per cent may also invoke the doctrine of equitable set-off. This is a principle in the law of equity closely akin to performance and satisfaction.

In *Raleigh* v. *Raleigh*, 35 Ill. 512, it is held that to establish a set-off in equity it is not necessary to show an *agreement* that one demand should be applied in liquidation of, or in set-off against another; but it is sufficient to show, that a credit was given or a payment made, under circumstances warranting the conclusion that the parties acted upon the understanding that the application should be made.

In *Briggs* v. *Penniman*, 8 Cow. 390, the stockholders

were liable for the debts of the company to the amount of their respective shares of stock. Penniman, a creditor, filed his bill in equity against the stockholders to enforce that liability. The defendants set up that they had severally made advances for the company, for which the company was indebted to them. The Chancelor, directed a reference to ascertain the amount of the defendants' liability, and ordered the master to allow the defendants, respectively, such sums as they had paid on account of the debts of the company *after its dissolution.* Upon appeal the decree confirmed this order.

Tallmadge v. *Fishkill Iron Co.* 4 Barb. 382 was a suit in equity by several judgment creditors against the directors of a corporation to enforce a liability created by statute, which was limited. It was held, on the authority of *Briggs* v. *Penniman* that the directors were entitled to have the amount of their advances for the company set off against their statute liability. *Harris P. J.* on p. 391, says, "The law, for the protection of creditors and to induce the greater carefulness in the management of the affairs of the corporation, adds the limited personal liability of the stockholders or directors to the effects of the corporation itself. In either case such limited personal liability is at an end, when the stockholder or director, has paid or been charged with debts, to an equal amount. He can be required to pay the amount of his liability but once; and whether he pays that amount voluntarily in the discharge of the debts of the corporation, or whether he is compelled to pay it upon suit brought by the corporation or its creditors, *having paid it,* he may set up such payment, as a defence against any further liability."

Where a creditor, by the statute, is at liberty to proceed

against single shareholders, it has been held that payment by a stockholder voluntarily made to any creditor of the corporation, of the amount of his liability, discharges it.

Jones v. *Wiltberger* 42 Ga. 578.

McCoy, J. said, "if he has taken up an amount of indebtedness equal to his proportional share of the whole amount, he has performed his undertaking,—complied with the obligation the charter imposes. * * * This is a suit upon a statutory liability. The parties stand upon their legal rights, and it is none of the plaintiff's business to inquire how the stockholder has settled with other creditors. All he can demand is that he shall have discharged his proportionate share."

See Thompson's Liability of Stockholders, Sec. 392.

Under the statute the Receiver of a National Bank proceeds against each stockholder individually, as representative of the creditors, and for their benefit, collectively. If any stockholder can show that he has paid the amount required of him, into a common fund for the benefit of creditors, he ought, on the same principle, to be discharged, though he could not plead the satisfaction of an individual debt, in defence; nor could he claim in equity a set-off of such payment, because there was no indebtedness from him to any individual creditor.

See *Lee* v. *Lee* 31 Ga. 26.

IV.

It is claimed that the plaintiff's payment is neither performance nor satisfaction, because it was made pursuant to an assessment laid by the stockholders upon themselves,

Jan. 10, 1882, under Sect. 5205, and can therefore be no satisfaction of the liability under Sect. 5151.

The meeting of Jan. 10, had no authority to make such assessment, as it was not legally called for that purpose—no notice of it having been given, as the by-laws required—and the vote then passed was simply an expression of the willingness of those present, informally and unofficially assembled, to pay one hundred per cent upon their shares for the payment of debts. Pursuant to that expression the plaintiff paid one hundred per cent on all the shares which it was claimed he owned.

No such assessment as is contemplated by Sect. 5205 was ever made, either by the directors or the stockholders, and the payment was not therefore specifically under that section.

But if paid under Sect. 5205, the effect was the same, as if it had been done with specific reference to Sect. 5151.

The pivotal inquiry in this case, is, whether the payment was made with the intention, express or implied, of satisfying the plaintiff's obligation, or in such manner as to constitute *performance* of it.

It is said, that it was for the purpose of restoring the impaired stock, but this could only be done by *paying the debts*. Assessments under Sect. 5205, are for the purpose of paying the debts of the bank, as the stock can only be impaired by contracting debts in excess of the assets,—and the impairment can only be removed, by the payment of such debts.

Thus it is, that the primary object of an assessment under Sect. 5205, is to pay debts—and the repair of the stock is only a *consequence* of it.

The stock is "impaired," in the sense of Sect. 5205, when by reason of the indebtedness of the bank, it is *in*

danger. It does not mean that the capital has been specifically *used*, for in this case—as in most national banks —the entire legal capital was invested in United States bonds, deposited in the Treasury, and remained intact at the time the plaintiff paid his $6,000. The stock is said to be "impaired," when it appears that a part of it may be required to pay debts,—and to be "wholly lost," when the debts are so large that it will require the whole capital or more to pay them.

The statute creating the liability, is *general* in its terms. It simply declares that, "the stockholders shall be held individually responsible, for all contracts, debts, and engagements, to the amount of the par value of their stock therein," which means as we have shown *all classes* of debts, or every *kind* of indebtedness.

The intention was to create one liability, and *one only*. In construing the statute, the Court will not violate that conspicuous principle of equity law, which under all possible circumstances resists the claim of double benefits; but in harmony with it, will seek such a construction as will relieve the stockholder upon the contribution by him of the amount required by the statute, to the fund for the payment of debts, when he derives no benefit unless discharged from further liability. It is not difficult to give these statutes such a construction.

The most unfavorable view for the plaintiff which can be taken of them, is, that if the assessment is made under Sect. 5205, and it fails to so reduce the debts as to leave the stock free, or to render it of some value, then its sole accomplishment is, *the payment of debts*, and he should have the benefit of it; while if the stock is freed by such payment from the liability of being taken to pay debts, the stockholder derives that benefit by the payment, and should be

content with it. He would then have some consideration for his money.

But a stronger view has been urged, viz., that the statute was intended to impose upon the shareholder but one liability at any time during the life of the stock. The only liability he is exposed to, is, the loss of his stock, and one hundred per cent more.

When he has contributed towards the capital of the bank, or the means of paying its debts, two hundred per cent of the par of his stock, he is free from further liability, whatever may be the future course of the bank. Creditors, past and future, have the benefit of the capital thus doubly paid, but can in no event call for more. The bank, if it does business afterwards, holds out to the public the faith and credit of this double paid capital, and to this the public trusts, not to a stockholder's liability already contributed to the "stock in trade," of the bank.

This case requires only a consideration of the first view.

Sect. 5205 was enacted in 1873, ten years after Sect. 5151. During that period there was no method of enforcing the personal liability of stockholders, except through a receiver; and resort to a receivership, when the capital was only partly lost, proved very burdensome and expensive, and made it necessary to wind up the bank.

In 1873 Congress provided the mode of enforcing the liability, prescribed in Sect. 5205. This mode of assessment gave the stockholders an opportunity of performing the obligation imposed by Sect. 5151, without the expense of liquidation by a receivership—and also the chance of saving to them their stock, if the amount thus raised was sufficient to meet the deficit of assets, without disposing of the capital.

This statute was not intended to *increase* the burden of the stockholders, but to lighten it. It was not its purpose to expose the shareholder to the liability of the double burden of twice paying the amount imposed by statute towards the satisfaction of the debts of an insolvent bank. If after such payment it was still insolvent, it could not have been the intention of Congress that they should lose the benefit of their payment. Such construction would impute to Congress a disregard of the equitable principle which opposes double burdens and double benefits.

But as the vote to assess themselves one hundred *per cent* was not passed at a meeting of stockholders called for that purpose, and the meeting therefore had no jurisdiction over the matter of assessment, it cannot be successfully asserted that the action of the meeting of Jan. 10, 1882, was under Sect. 5205.

Legal action under that section must be such as to bind the whole body of stockholders. It is obvious that this did not. The meeting for this purpose was informal, being called only for the purpose of electing directors,—while the by-laws required notice of all business to be acted upon. (Eq. Record, p. 16.)

It was no more than an expression of the purpose of those present to voluntarily pay a hundred per cent on their stock. For what, is the question—and with what legal effect?

The bank was hopelessly insolvent. Its debts exceeded the actual value of its assets some $3,000,000.

The stockholders present were then informed, both by the notice of the Comptroller dated December 16, 1881, and by the statements of his agent, Needham, that the entire capital stock of the bank was lost, and that an as-

sessment of one hundred per cent upon the par value of each share of the stock would be required.

They were then notified that if they did not voluntarily make and pay such an assessment, the bank would be put into the hands of a Receiver, and the payment enforced under Sect. 5234.

The notice and demand of the Comptroller, and the statements of Needham in his report read to that meeting, and his reiteration of the assertion then, and to individual stockholders subsequently, that if the stockholders did not voluntarily assess themselves one hundred per cent, the bank would go into the hands of a Receiver, must have been largely influential in inducing the voluntary payment.

It cannot, therefore, be assumed that the repair of the stock was alone in contemplation at the time of the vote to assess, or at the time of the payment. Nor can it be assumed that the stockholders acted wholly under Sect. 5205.

That section applies to instances where the capital stock of a bank "shall have become *impaired* by losses or otherwise," not where it has become *wholly lost.*

If applicable to the latter, it would be applicable where the losses would leave the bank insolvent after the whole amount of the capital stock had been paid in a second time; leaving nothing of value to the stockholders.

In the case of this bank, an assessment under Sect. 5205, "sufficient to pay the deficiency in the capital stock," would have required at least four hundred per cent upon its par value.

The Comptroller, under that section, is not required to give notice to the association where the capital stock has been "*wholly lost,*" but only where it has become

"impaired;" and he is not to name a *percentage* which is to be assessed, but is only to require the stockholders to pay the deficiency in the capital stock, *whatever that may be*. The notice of the Comptroller, dated Dec. 16, 1881, is not adapted to Sect. 5205, but is more pertinent to the liability created by Sect. 5151.

It does not notify the association, that its capital stock has become "impaired"—nor that the "*deficiency*" must be paid within three months; but, after stating that "the *entire capital stock* of the Pacific National Bank of Boston, Mass., amounting to $961,300 *has been lost*," he gives notice, in substance, to the association, to assess and pay *one hundred per cent* upon the amount of capital stock held by each shareholder; and that if this is neglected for three months after the receipt of the notice, a Receiver will be appointed, and the assessment be made and enforced under Sect. 5234.

Though he requires an assessment of one hundred per cent, there is no assurance or intimation in the notice, that the capital stock will thus be made good, or that there will be any other beneficial result to the stockholders, than a relief from the liability which would be enforced if the bank went into the hands of a Receiver.

He does not say that the payment of such an assessment would *restore* the stock, nor that it would pay the debts. This notice was calculated to impress the stockholders with the belief, not that their stock would be restored to them by the payment of such an assessment, but that if they yielded to the requirement of the Comptroller, and paid one hundred per cent then, they would be discharged from their statute liability.

It is but fair therefore to presume that the largely influential motive of the stockholders in the assessment, and volun-

tary payment of the hundred per cent, was, the extinguishment of the statute liability.

This must be regarded as the implied intention of the stockholders. It cannot be reasonably assumed, that they understood, that if they voluntarily paid 100 per cent, under the facts presented to them, they would still be liable to the *further* assessment by the Comptroller and enforced payment of one hundred per cent more. We have the affirmative proof of the intention in all these cases.

V.

By Sect. 5151 the creditors are to have the benefit (in addition to the assets of the bank) of an individual liability of the stockholders, to the amount of their shares, severally.

If they have received this benefit, *no matter what the manner of it*, they have all the statute intended.

It cannot be material to the creditors, *what methods* were employed in the production of this fund, under what section of the statute the proceedings were had, or whether it was produced without any formal proceedings. It might be the fruit of individual volition.

Under the first act, (1863) no method of enforcement was provided.

It will hardly be claimed that under that act a stockholder could not have discharged his liability, by a voluntary payment.

To supply the defect, the act of 1864 provided a method of enforcement.

Does *this* deprive the stockholder of the power of discharging the obligation voluntarily?

The answer is too plain for argument.

The thing performed was clearly, in this case, *ejusdem generis* with that which the stockholders had engaged to perform, even if it cannot be much more strongly stated, as a direct *performance* of that engagement; and should therefore be treated as an equitable satisfaction.

VI.

Substitution may be made in equity. Though it comes to the same thing as satisfaction, it is treated independently as a means of avoiding double benefits.

As the statute contemplates only one assessment to be made for the benefit of creditors, Sects. 5151 and 5205 must be considered together; and if the money has been raised under the latter, and has gone to the benefit of creditors solely, the assessment may be regarded as a substitution for an enforced payment by a receiver under Sect. 5234, as in either case the result is a compliance with the requirement of Sect. 5151.

And it is not material whether the substitution was intended at the time of the assessment, if the purpose of the statute has been accomplished.

VII.

Concede, for the sake of the argument, that the assessment was made under Sect. 5205, and was wholly intended to make good the capital—to repair the "impaired" stock. It was done under a *gross mistake* as to the value of the assets, and could not have the intended effect—could, *in no event*, benefit the stockholders, as has now been proved. And the mistake was by the representatives of the creditors —the comptroller and examiner.

The money was, therefore, *in fact* paid for the benefit of

creditors, and appropriated to the debts of the bank—not to the repair of the stock.

The creditors have the full benefit of it. The stockholders have no consideration for that payment, unless it goes to the liquidation of their statute liability.

Equity relieves against mistakes; and refuses to allow parties to have the benefit of money paid through a misapprehension of facts.

1 Storys Eq. Sect. 140.

2 Pom. Eq. Sect. 852.

And there are many circumstances under which relief will be granted where payments of money have been made, under mistake as to the parties' existing *legal* rights or liabilities.

2 Pom. Eq. Sect. 849.

It is no answer to this proposition to say, that the stockholders undertook to sustain their bank by an attempt to make good the impaired stock by an assessment for the purpose of preserving the value of it to themselves, but being mistaken they must now bear the consequences of their mistake.

The mistake was the result of a gross misapprehension of the facts—a gross *misrepresentation* of them.

It is, therefore, inequitable, that they should lose all benefit of that payment; and equally inequitable that the creditors should hold the money thus paid, without any consideration.

Equity forbids their holding money obtained by them by means of such a mistake, without giving the stockholders credit for it.

It may be said that the mistake was partly, at least, one of law, the stockholders having supposed that an assessment regularly made under Sect. 5205, would, if paid, discharge them from further liability.

If this were so, the principal mistake inducing the consent to such assessment, was of *fact* concerning the value of the assets, and a court of equity will give relief in such case.

2 Pom. Eq. Sect. 849.

Bank of Hindustan v. *Alison* L. R. 6 C. P. 54.

The Comptroller, (in effect) said to the stockholders, Dec. 16, 1881,—"the stock is all gone,—you assess or I shall." They assess and pay. Then he discovers, if he did not know it before, as he ought, that the amount thus raised, with the assets, will not pay the debts, and closes the bank; and himself imposes another assessment. This is clearly a fraud upon the stockholders, and equity will restrain its enforcement.

It is immaterial whether, when he made his first demand upon the stockholders, the Comptroller supposed its payment would make the stock good. He was in possession of the bank, excluding its officers and stockholders, and was bound to know its condition.

The stockholders had a right to rely upon him. If he meant by his notice that the assessment by the stockholders would restore the stock, he deceived them—whether wittingly or unwittingly is not material; the result is the same in either case.

It is sufficient that they were deceived, and he should not be allowed to proceed with a further assessment.

If the Comptroller makes an unlawful assessment, or a Receiver attempts to enforce one "a court of equity, if its aid is invoked, will promptly restrain him by injunction."

United States v. *Knox*, 102 U. S. 422, 425.

R. S., Sects. 718 & 719. Rule 55.

VIII.

Had the motive been, in part, or even largely, an expectation that the stock would be made good by the payment, that expectation has *wholly failed.* The stockholders have received no benefit. But the fact remains, that they have paid one hundred per cent of the par value of their stock, *towards the debts.*

The failure to realize the expectation that the stock would be made good, (if such expectation there was) was due to the fact, that the bank was so greatly insolvent when that assessment was made, that even $961,300, if fully paid, with the other assets, would not liquidate more than one-third of its debts.

The payment was made under a gross mistake as to the value of the assets—whether produced by fraud is not material to this view of the case—when paid, if the full truth had been known to the stockholders, they would have seen that the payment of an assessment of $100 on each share, would not restore the stock to them, but would simply increase the assets of the bank.

The creditors have the benefit of that payment. The stockholders have none—and *can have* none.

The double payment of the statute liability of stockholders in National Banks, must be quite as abhorent to equity as double portions, or any other double benefits.

IX.

Again:—If the payment is to be regarded as made under *Sect. 5205*, and solely for the purpose of making the capi-

tal stock good, as this could not be accomplished unless all the stockholders paid, it may be fairly contended, that the payments were made under an implied agreement, that the money was not to be used by the directors, unless all the stockholders paid the assessment upon their stock, and that until then, the money was to remain in the hands of Needham or the directors, as the property of those who paid it.

The object, as the Receiver contends, must have been to bring up to par in value, the capital stock of the bank. The whole stock must be brought up, not the shares of those who paid merely.

Only a part of the stockholders paid the assessment; but the directors appropriated the money thus received to the payment of the debts of the bank, without waiting to see whether the whole would be paid.

The creditors hold it, therefore, by an unauthorized appropriation of the directors,—and through this mistake the purpose of the payment having failed, it is *unjust* that the creditors should hold it, without giving those stockholders who paid it, credit for it, as a contribution towards the payment of the debts.

Suppose the assessment had been paid upon 100 shares only,—could the money be held for the purpose of repairing the stock, when it became demonstrated that it could not *thus* be done?

The directors who received the money were the bailees of those paying, and the money remained the property of the latter. It would be the same as if the money had been deposited in the bank.

Mr. Justice Miller says, in *Marine Bank* v. *Fulton Bank*, 2 Wall. 256, repeated in *Scammon* v. *Kimball*, 92 U. S. on

p. 370, "deposits with bankers may be divided into two classes, viz: those in which the bank becomes bailee of the depositor, the title to the thing deposited remaining with the latter; and that other kind of deposit peculiar to banking business, in which the depositor loans the money to the banker subject to his draft." * * *

Neither the bank nor its officers could divest the stockholder of his title to the money, except upon the fulfillment of the conditions upon which the deposit was made, so that equity could not reach it.

In *Scammon* v. *Kimball* cited above, (92 U. S. 362,) it was held that if the assets of the bank have been improperly distributed among the stockholders, the creditors may follow the assets in the hands of the stockholders, who will be considered as holding the funds charged with the trust in favor of the creditors, and a court of equity will enforce and compel the application of the same to the satisfaction of the debts of the corporation (p. 367).

The converse of this proposition should be true. If a special deposit by a stockholder, either with the directors or the cashier of an insolvent, and a suspended bank, is improperly appropriated by the directors to the payment of the debts of the bank, and distributed among its creditors, in equity the stockholders' title to the money is not thus changed, but the creditors who have received this fund should be charged with the trust in favor of the stockholders; and a court of equity ought to compel its application to the extinguishment of the stockholders' personal liability.

It is as obviously *unjust* in the one case as the other, that the holders of the money obtained through such im-

proper distribution, should be entitled to keep it without giving credit for it to the true owner.

For a much stronger reason, if the special deposit is made by the stockholder for the express purpose of being applied to the payment of debts, and relieving the bank of its insolvency, upon a condition which is not fulfilled, and without authority his money is distributed to the creditors, he ought in equity to be protected against a second liability for a like contribution.

See *National Bank* v. *Insurance Co.*, 104, U. S. 54.

X.

It is said that the stockholders ought to be further charged because something remains due upon debts contracted subsequent to March 18, 1882.

To this we answer:—

1.—The stockholders were only required to contribute to a fund for the payment of the debts—not *to pay* them.

If they paid the money to the officer whose duty it was to pay them, whether of the bank or the government, their obligation was performed. It was raised and paid into the hands of the Examiner who was then in charge.

Under the authority of the Comptroller the officers of the bank received the fund from the Examiner, and devoted the whole of it to the payment of debts.

It was all paid out at *some* time before May 22d,—at what time the case does not show, but it was before the 20th of May.

It must have been paid in part to new as well as old creditors—upon all classes of debts both new and old.

The money paid in by the stockholders to pay debts was mingled with other moneys of the bank by the Examiner, and by him the whole amount was placed in the

directors' hands with which to pay debts and so applied during the time the bank was open.

Suppose there are some new creditors to whom there is a balance due; how are they in worse case than the old creditors, to whom also there is a balance due? Our money has been applied to both classes, indiscriminately. If not paid out *pro rata* among all the creditors, it is not our fault, nor does the statute contemplate that we shall be liable to each creditor to pay him a percentage of his debt.

It is immaterial that we raised the fund before some of the debts were contracted.

The new creditors got the same benefit from it as if it had been raised after they became creditors; and we stand as to them, just as if it had been.

2.—But whether the new creditors actually received any of this fund cannot affect the plaintiff's liability. He was not responsible for its distribution.

The fund contributed by the stockholders under the requirement of Sect. 5151, bears the same relation to the bank and its creditors that the capital stock does.

The design of the statute was, to require the stockholder not only to pay the amount of his subscription to stock as a security to creditors, but also in case of insolvency an additional sum of one hundred per cent for the same purpose.

Sect. 5140 requires the payment of at least fifty per cent of the capital stock before commencing business; and the remainder in installments of ten per cent each. By Sect. 5142, no increase of capital is to be sanctioned until the subscriptions for new stock are fully paid.

This is a fund for the security of creditors while the bank

is solvent. If it becomes insolvent, Sect. 5151 requires the stockholders to add a sum equal to the stock of each for the same purpose.

In *Sawyer* v. *Upton* 91 U. S. 56, on p. 60, the Court say:—"The capital stock of an incorporated company is a fund set apart for the payment of its debts. It is a substitute for the personal liability which subsists in private copartnerships. * * * It is publicly pledged to those who deal with the corporation for their security. Unpaid stock is as much a part of this pledge, and as much a part of the assets of the company, as the cash which has been paid in upon it. Creditors have the same right to look to it as to anything else, and the same right to insist upon its payment as upon the payment of any other debt due the company. As regards creditors there is no distinction between such a demand, and any other assets which may form a part of the property or effects of the corporation."

The same must be said of the fund which the stockholder agrees to contribute in case of the insolvency of the bank. Though this is a conditional obligation, it may be enforced in case of insolvency, for the benefit of creditors, as the promise to pay for the stock might be.

In neither case can this be done directly. It must be through the corporation, or its representative, a Receiver, except in case the bank is in liquidation by vote of the shareholders.

In *Patterson* v. *Lynde* 106 U. S. 519, (an Oregon case), a suit was brought by a creditor against a stockholder to enforce the liability of the latter. The constitution of Oregon provides that "the stockholders of all corporations shall be liable for the indebtedness of the corporation to the amount of their stock subscribed and unpaid." A statute of the state provides that if the subscriber for

stock sells it without having paid up, he is liable to existing creditors for the amount of the balance due.

The Court say, "The liability of the stockholder is upon his obligation to contribute to the capital stock which is a trust fund for the benefit of those to whom the corporation, as a corporation, becomes liable * * * The liability is not *to* the creditors but *for* the indebtedness. The subscription is a part of the assets of the corporation, so far as the creditors are concerned. The liability of the stockholder to the creditor is through the corporation, not direct. There is no privity of contract between them. The stockholder is liable to the extent that the subscription represented by his stock requires him to contribute to the corporate funds; and when sued for the money he owes, it must be in a way to put what he pays, directly or indirectly, into the treasury of the corporation for distribution according to law."

The same must be said of the liability under the National Banking Acts of a stockholder to contribute one hundred per cent in addition to his stock towards the payment of debts.

The liability is not direct but it is through the corporation, whether represented by its officers, or an officer of the government. There is no privity between the stockholder and the creditor, and the creditor cannot therefore personally pursue the stockholder, but the stockholder may be compelled to contribute to the corporate funds for the payment of debts in the same manner as if delinquent in the payment of his stock; and whether compelled to pay up for stock, or the additional liability, it must be done through the corporation, and the money goes into the treasury of the corporation for the payment of debts. The stockholder cannot therefore be held responsible for the manner of its distribution.

If the fund is paid to the directors it is their duty to apply it; if to any officer of the government in possession, the duty is his. And if there are creditors who get no part of it the stockholders are not responsible.

To discharge the stockholders liability a receivership is not necessary. If, while the bank is in the hands of its officers, the necessity of the additional fund becomes apparent, the stockholders on notice of the fact to them, may pay the hundred per cent. They fulfill their obligation if they pay it into the treasury of the bank.

If the officers of the bank or of the government, after March 18, created new debts by borrowing money to pay old ones, but made no losses in so doing as appears in the Record, there was no increase in the volume of indebtedness; and the substitution of new creditors for old ones without increasing the indebtedness, by such officers, after the money was paid, created no new liability on the stockholders.

The directors are not the agents of the stockholders either in the accumulation or the disbursement of the funds necessary for the payment of debts from whatever source derived.

Smith v. *Hurd* 12 Met. 371.

Shaw, C. J. in that case (on p. 384), says: "There is no legal privity, relation, or immediate connection, between the holders of shares in a bank in their individual capacity on the one side, and the directors of the bank on the other. The directors are not the bailees, the factors, agents or trustees of individual stockholders." And on p. 385, he says: "The injury done to the capital stock by wasting, *impairing* and diminishing in value, is not, in the first in-

stance, nor necessarily, a damage to the stockholders. All sums which could, in any form, be recovered on that ground, would be assets of the corporation, and when collected and received by directors, receivers, or any other person entitled to receive them, they would be held in trust, first to redeem the bills and pay the debts of the bank; and it would be only after these debts were paid, and in case any surplus should remain, that the stockholders would be entitled to receive anything."

It is obvious that in this case the stockholders could in no event have any interest in the sums of money received on account of the wasting or impairment of the capital stock, as the debts so greatly exceeded its whole amount. In no event can there be a surplus; and the officers in possession of the funds did not act, therefore, as agents of the stockholders.

See Thompson's Liability of Officers and Agents of Corporations, pp. 352 and 461.

When the bank was opened by permission of the Comptroller on the 18th of March, the debts were not paid or secured, and the bank was in the struggle to raise funds for this purpose. It is not like the case of a bank that has been made solvent by the payment of a hundred per cent by the stockholders, and then gone on in business to make money for *them*. The scheme of opening its doors to business was to assist in paying its debts by making money as the creditors and directors hoped. This was done without the authority of the stockholders. They were not consulted about it. As agents of the corporation they had no right to use the fund contributed by the stockholders to pay the debts, for any other purpose. They could not thus increase the individual liability of the stockholders, without

their express consent. In this respect they were strangers to the stockholders, and not their agents.

If it be said that individual stockholders expressed directly or indirectly a desire that the bank should open, it was only upon condition that it became solvent. That it would do so upon the payment of the assessment was represented to stockholders at their meeting of Jan. 10, and many of them perhaps believed it, but it cannot be pretended that any stockholder contemplated opening the bank to business unless it was first ascertained that it was solvent. No one supposed that the Comptroller would consent to it until the bank was made solvent. It was clearly his duty to retain possession of the bank until it had become solvent, and if it never became so to appoint a Receiver. Creditors and stockholders alike had a right to trust to his judgment, and to his fidelity in the performance of an official duty. All knew, or supposed they knew, that the bank would not be permitted to open its doors to business, unless a fund was accumulated sufficient to pay the debts and restore the stock. Opening the bank to business was a scheme of the creditors and in their interest managed by Best, one of the largest of them.

3.—The new creditors are in no event without benefit from the fund created by the voluntary payment by the stockholders. No money was lost after the doors of the bank were opened, so that the new debts have derived a benefit from this fund, as it increased the assets *pro tanto*, of which they were entitled to their share.

The bank was not the worse off for the new business, and the creditors as a whole were no worse off. If there is something due to the new depositors their deposit has

gone to pay debts and not to the stockholders. As they could in no event derive a benefit from it, it would be inequitable to charge the stockholders with its payment. The money borrowed—received from depositors—was simply a borrowing of one party to pay another, a substitution of a new debt for an old one, in a proceeding by the directors, expressly authorized by the Comptroller, which was in fact only a part of the process of liquidation. The Comptroller thought the directors could make more of the assets than he could, and therefore put them into their hands. The primary object was to raise money to pay the debts.

If it be said that the ulterior object was to redeem the stock, the sufficient answer for the stockholder is, that there was no possibility of this. The actual condition of the bank precluded all hope of it. This condition was known, or should have been known to the directors, and the Comptroller who had the sole power over the assets. If they made a mistake in consequence of which any class of creditors suffer, they and not the stockholders are responsible for it.

4.—The depositors, subsequent to the second opening, knew that the stockholders had paid their 100 per cent towards the debts, before the doors of the bank were opened.

Nearly all the new deposits were made by the old creditors—simply an increase of their credits to the bank. So they gave no credit to the liability of the stockholders for future business.

XI.

LAW.

There was no legal increase of the capital stock from $500.000.

(1). The directors took the proper action to increase it to $1,000,000 Sept. 13, 1881. The plaintiff subscribed for thirty shares of that increase,—paid for it and received a certificate for thirty shares Nov. 1, 1881. When the certificate was issued there had been no legal increase of the stock, and it therefore gave the plaintiff no new stock.

If the bank had earned a surplus after its receipt by him, it would have entitled him to no dividends. The issuance of it was *ultra vires*, against the *positive inhibition* of the statute.

Only a part of the stock had been subscribed or paid in, and no certificate of the Comptroller obtained.

Sect. 5142, declares that "no increase of capital *shall be valid* until the whole amount of such increase is paid in and notice thereof has been transmitted to the Comptroller of the currency, and his certificate obtained specifying the amount of such increase of capital, with his approval thereof, and that it has been duly paid in, as a part of the capital of such association. Stock issued contrary to this statute is as clearly void,—incapable of being made valid by any subsequent action of the holder—as if the increase had been in excess of the amount of stock allowed by articles of association, or act of incorporation.

In the one case as in the other, it is *ultra vires* because unauthorized by law,—an act of the officers of the bank *forbidden* by the statute, not simply irregular in the manner of its doing.

In *Scovill* v. *Thayer* 105 U. S. 143 a corporation was organized under general laws of the state, by articles of incorporation entered into by the parties and filed with the secretary of state. The statute provided that the corporation might increase "its capital stock to an amount not exceeding double the amount of its authorized capital." The articles authorized a capital of $100,000. It was regularly increased to $200,000.

The corporation attempted subsequently to increase it to $400,000 by taking the steps required by law for the increase of stock, in two issues of $100,000 each.

Thayer was a stockholder, participated in the meetings which voted the third and fourth issues, and held 585 shares of those issues, upon which he paid $50 per share. The corporation became insolvent and was put into bankruptcy. A suit was brought against Thayer to recover the balance due on this stock. The Court held that it could not be recovered, and established these propositions. (1). "Certificates of stock of an incorporated company issued in excess of the limit imposed by its charter are void, and the holder of them is not entitled to the rights, nor subject to the liabilities of a holder of authorized stock. (2). He is not estopped to set up the invalidity of such unauthorized stock as a defence to an action by creditors against him, to recover the balance unpaid thereon, by the fact that he attended the meeting at which it was voted to assess the same, or that he received and held certificates therefor, or that the officers and agents of the company represented its capital to be equal to the amount of both its authorized and unauthorized stock," or by the payment of fifty per cent on the unauthorized stock held by him.

The Court after stating that the attempted increase of stock was *ultra vires*, say, (p. 149) "to decide that the holders of stock issued *ultra vires*, have the same rights as

the holders of authorized stock, is to ignore and over-ride the limitations and prohibitions of the charter."

The prohibition of the statute in the case at bar, must have equal force with a prohibition of charter.

It is true, that a stockholder cannot set up informalities in the issue of stock, where the corporation had power to issue it; but in this case, the corporation had no power to issue the new stock, as it was prohibited by law.

The Court say in *Scovill* v. *Thayer*, "The corporation being absolutely without power to increase its stock above a certain limit, the acquiesence of the shareholder can neither give it validity nor bind him, nor the corporation. A distinction must be made between shares which the company had no power to issue, and shares which it had power to issue, although not in the manner in which, or upon the terms upon which they had been issued. The holder of shares which the company had no power to issue, in truth had nothing at all, and are not contributors."

It will not be denied that at the time the directors delivered to Delano a certificate of stock to the amount of his subscription to new stock, no such stock had been created. It had no existence. At that time the officers of the bank had no authority to issue certificates of stock above the $500,000 which had been created before the vote of Sept. 13, 1881. Their issuance of such certificates was, therefore, clearly *ultra vires.*

Where an amalgamation of two companies has been attempted, and, in pursuance of the scheme of amalgamation, certain shareholders of the A. company apply for and have alloted to them their quota of shares in the B. company, and the amalgamation is afterwards judicially determined to be void, such shareholders of the A. company will not be estopped, by their conduct or acquiesence

in the arrangements from afterwards denying that they are shareholders in the B. company.

Bank of Hindustan v. *Alison*, L. R. 6, C. P. 54.

Confirmed on appeal in the Exchequer Chamber reported in the same volume p. 222.

See Thompson's Stockholders, Sects. 174, 175, 172.

In case of a void amalgamation, the fact that two of the directors of the selling company, to whom shares had been alloted in exchange for shares in the purchasing company, acted under the terms of the agreement as directors of the purchasing company, will not estop them from denying their liability as contributors of the purchasing company.

Stace & Worth's Case, L. R. 4 Ch. (app. 1869,) 682.

In that case by the articles of association of the London & Northern corporation, power was given to amalgamate with another company by an extraordinary meeting of that company held for the purpose. An agreement of amalgamation with another company was made, providing for a selection of directors inconsistent with the mode prescribed by the charter of the London Company. The agreement was acted upon, but was never confirmed by an extraordinary meeting of the London Corporation, but was by the Investment Company with which the agreement of amalgamation was made. The Court held the amalgamation was void, upon the ground that its terms gave to the Investment Company the power of appointing a majority of the board of the Amalgamated Company. Here

the holders of authorized stock, is to ignore and over-ride the limitations and prohibitions of the charter."

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was simply a deviation from the mode of amalgamation prescribed by the terms of the articles of association.

(2). Should it be said that the new issue was not prohibited by statute, but that after the passage of the vote to increase the capital to a million, a part was subscribed and paid in, and certificates issued, upon the expectation that the whole amount would be taken and thus the issue made valid, and that it is therefore a contingent increase, dependent upon the subsequent compliance with the statute which the holders of the new issue have a right to require, but that this requirement may be waived by them,—the answer is, that all the holders must waive it.

To make the increase to $961,300 valid would require the assent of all those who had taken and paid for shares in the $500,000 increase. The attempted increase in December 1881, is to a definite sum of $961,300 approved by the Comptroller, and the amount of the capital cannot be varied by proof that a part only of the subscribers ratified, and that the stock is therefore increased *pro tanto*.

If a single shareholder refuses to ratify, the capital is not $961,300, but a less sum; and there has been no approval by the Comptroller of such less amount. To effect an increase by ratification, the number of those ratifying the issue must be first ascertained and reported to the Comptroller, and he must thereupon issue his certificate approving the increase to such amount. Otherwise it would be clearly invalid, because so expressly declared by the statute.

That to hold those who, previous to increase, subscribed to a different capital, would require their consent, will hardly be questioned. In such case, the previous subscriptions and payment for stock can only be made valid by *ratification*, and its amount must depend upon the number of subscribers who ratify. But the stock is not increased

to this amount until it is approved by the Comptroller.

Imp. Bank of China v. *Bank of Hindustan* L. R. 6, Eq. 91, 100.

But the true ground is, that the new stock was issued without authority of law, and therefore *void*, not voidable merely. Persons dealing with managers of a corporation must take notice of the limitations imposed by law upon their authority.

Scovill v. *Thayer*, 105 U. S. p. 151.

Zabriske v. *Railroad Co.* 23 How. 341.

(3). The increase was never afterwards made valid, by subscription or payment of the amount voted. It is possible that the plaintiff might have been held as a stockholder for the 30 shares of new stock issued to him if this corporation had subsequently succeeded in getting the whole $1,000,000 subscribed and paid, and had obtained the approval of the Comptroller to that increase. But as this was never done, plaintiff took nothing by that certificate, and by receiving and retaining it, became liable for nothing. Payment for the stock did not bind him as was held in *Scovill* v. *Thayer*.

(4). The subsequent act of the directors Dec. 13, 1881, in which they attempted to reduce the stock to $961,300 was totally void. This can only be done by a two-thirds vote of the stockholders.

R. S. Sect. 5143.

That vote cannot be treated as a vote to increase the capital from $500,000 to $961,300. Such a construction would do violence to its terms and run counter to its whole tenor.

It declares that a vote was passed Sept. 13, to increase the capital to $1,000,000, which the stockholders had a right to take at par; that $461,300 had been taken and $38,700 had not been taken and paid in, and that "said $38,700 of said stock be and is hereby cancelled and deducted from said capital stock of $1,000,000." They then declare that the *paid up* capital stock amounts to $961,300.

This is a vote to *reduce* the capital stock; or it is nothing. A vote of a corporation cannot be construed to mean something in direct conflict with its terms; nor can it be held to accomplish that which its terms do not express.

The vote in its very language recognizes the existence of a capital of $1,000,000, and proceeding upon that theory, attempts to reduce it to $961,300.

The assertion following the vote of reduction that the "*paid up capital*" is $961,300, implies that there is a further capital of $38,700, which is not yet paid up, but which may at some future day be collected. The vote does not declare that the $38,700 has not been taken or subscribed, but only that it has not been "taken, and paid up."

This whole proceeding was upon the theory that the capital of the bank was $1,000,000, but as only $961,300 had been paid in, and as they could not have a certificate of increase from the Comptroller for any more than the amount paid in, the directors could reduce the capital to that sum. This is apparent from the interview with the Comptroller narrated in Stone's deposition (p. 65, Eq. R.)

This method of getting a certificate of approval from the Comptroller, without a regular vote to increase the capital to that amount, was resorted to because they knew that a vote to increase the capital at that time would require a new subscription for the increased stock. This it was obvious they could not get, because the bank was

largely insolvent and the stock would be worthless. It had been shown that it was insolvent at the time of the vote to increase, Sept. 13, and that that insolvency had been fraudulently concealed from the subscribers to the $461,300 of the increase.

If the vote of Dec. 13, can be treated as a vote to increase the capital stock $461,300, not a dollar of that increase was ever subscribed or paid. The previous subscriptions could not be held upon it for many reasons. (1). That subscription was to a capital of $1,000,000. It is a familar principle that where on the organization of a corporation, the number of shares of the capital stock, and the sum to be paid for each share are agreed upon, the subscribers are not bound to pay their subscriptions, until the whole number of shares are taken.

Thompson in Liability of Stockholders, Sect. 120.
Cabot & West Springfield Bridge v. *Chapin et al*, 6 Cush. 50.
Peoria R. R. Co. v. *Preston*, 35 Iowa, 115.

This is upon the ground of contract. The subscriber agrees to take a certain number of shares in a capital of a given amount. If the corporation proceeds to business without that amount he cannot be held. The Court say in 6 Cush. 52, 53, "It might materially affect the interests of the subscribers whether the whole number of shares or a less amount was subscribed; both as respects the assessments to be made upon the stock, and also as to the ability of the corporation" to accomplish its purposes.

An agreement to take a certain number of shares of stock, of a given amount, may be evidenced without a subscription paper, but *here* was a subscription. The vote of increase to $1,000,000 was printed with a communication

to the stockholders that they had a right to take the new stock at par, to an amount equal to the stock then held by them. Upon the paper sent to him by the bank containing this notice the plaintiff subscribed for 30 shares. He subsequently paid for them when it was demanded, and took his certificate upon the assumption that the stock had already been taken, and had been or would be made valid by the approval of the Comptroller. It cannot be doubted that this was sufficient evidence of a contract between him and the bank, that the capital should be $1,000,000. If it was not made up to this he could not be held and the money he had paid for the stock could be recovered back, as between him and the bank, however it might be as to creditors.

It is obvious that the bank could not hold him as a stockholder for any part of a subsequent increase, to a less amount, without a new subscription.

The attempt of the directors and the Comptroller in December, to make those persons who had taken $461,300 of the $500,000 increase, stockholders for that amount, with all the liabilities of the stockholders of an insolvent bank upon them, savors strongly of a conspiracy to defraud them.

The case shows that the same directors had obtained the subscription by fraudulently concealing the insolvency of the bank. Having failed to get the increase which was necessary to hold them together, they resort to a new scheme, after the public failure of the bank, and while it was in the hands of the Comptroller, by his agent Needham. Before the vote of Dec. 13, was passed the directors knew that they had already defrauded those subscribers of all the money they had paid for the proposed stock. They knew that if they could hold them as stockholders, they would be compelled to pay 100

per cent more upon that stock towards the debts, and that for all this money they would have nothing. With this knowledge they sent their agents and Best, the agent of the creditors, to Washington to consult with the Comptroller. The Comptroller already had been informed by the reports of the examiner to him of the insolvency of the bank, and of the gross irregularities of its officers, indicating utter inefficiency, if not dishonesty.

At that interview he was informed that the increase of capital which had been voted, had not been wholly taken and paid. He knew that those who had taken a part of the increase could not be held as stockholders, and that although they must lose what they had paid on their subscriptions, they could be held for nothing more, unless some new scheme was devised. He knew that any scheme by which they would be then held as stockholders, without their consent, would be a fraud upon them, and that they would be cheated out of a further sum equal to that which they had already lost. He nevertheless, in conjunction with the agents of the directors, concocted this scheme:—that the directors should pass a vote cancelling so much of the stock as had not been taken, and send him a certificate that the increase was only $961,300, and that that was paid up; whereupon he would send them a certificate that the stock of the bank was lawfully increased to that amount.

He did not suggest to the directors what would have occurred to most honest minds, that this should not be done without the consent of those stockholders who had subscribed and paid in their money towards the $1,000,000 increase. It does not seem to have occurred to him, that they had any rights. He seems to have been oblivious of their rights of contract, or to have intentionally disregarded them. This scheme was carried out by the vote sub-

sequently passed, and reported to him on the 16th day of December. On the same day, he sent back to the directors his approval of the *scheme accomplished*, declaring in his certificate that the capital stock was $961,300. By the same mail he sent to the directors an order of assessment upon this *new made stock*, to the amount of 100 per cent of its par value for the payment of debts, declaring in that notice, that that same stock was all lost—lost before it was created—and that if they didn't pay another 100 per cent upon it, he would appoint a Receiver, and compel them to do it. The Comptroller thus at the same sitting created the $461,300 stock, as he well knew, in fraud of the rights of the subscribers, and imposed upon them an additional burden of a like amount more! All this in a bank whose debts at that time were over $3,000,000 more than the value of its assets, with a capital stock of only $500,000.

These new stockholders having been induced, by his notice, to pay the additional hundred per cent, he now demands of them another hundred per cent upon the same stock. Three hundred per cent, all by fraud.

Will such a transaction receive the sanction of a Court of equity, by permitting him to enforce the payment of this new assessment?

(5). In all their doings affecting the stockholders, where the interests of the stockholders were adverse to the bank, and to its creditors, the directors were not the agents of the stockholders, but of the bank and its creditors as we have shown.

Therefore it is, that the creditors are precluded from all benefits obtained, or claimed to have been gained over the stockholders in the interest of the creditors, by the fraud, misrepresentations, or mistakes of the directors.

And the same is true of all doings of the Comptroller, of a like character.

The action of the directors Dec. 13, 1881, in attempting to hold those persons as stockholders for new stock of a less increase, who had subscribed and paid for shares in the million dollar increase, without consulting them, was a gross fraud upon such subscribers. The attempt by the directors was in the interest of the creditors. They cannot therefore hold such subscribers as stockholders, as that would be to take advantage of the fraud of their agents.

In this scheme the Comptroller necessarily participated, and if there was no wrong intent on his part towards the subscribers, he made a gross mistake, which must have been the result of culpable official negligence.

The representations of Needham, the Comptroller's agent, and of the officers and agents of the bank, at the meeting of January 10, 1882, or subsequently to individual stockholders, in relation to the value of the assets of the bank, was at least a *gross mistake*, inducing stockholders to take action adverse to their interests. Creditors cannot, therefore, invoke the doctrine of estoppel, or of ratification against the stockholders, by reason of anything done at that meeting, by the stockholders, or in consequence of the action of that meeting.

At the time of the attempt to reduce the stock, it was known to both the directors and Comptroller that the subscribers liability for debts would be greater on a reduced capital than if it was $1,000,000, because the larger the capital the less the percentage on each share would be required to pay the debts.

Neither the doctrine of ratification nor of estoppel can be invoked, unless the party out of whose acts they arise,

was fully informed of the true state of facts upon which his action was based. If the ratifying act was based upon a mistake of the facts, it is sufficient, withoud fraud.

It will not be pretended that any of the new stockholders, at the time of the meeting of Jan. 10, or at the time they paid the voluntary assessment, were correctly informed of the actual condition of the bank. Neither the creditors, new or old, nor their representative the Receiver, can claim therefore a ratification by the stockholders of the directors vote of Dec. 13, 1881, or of the action of the Comptroller certifying the stock to be $961,300, even if it had been attempted by the whole body of them.

XII.

Though, on the authority of *Scovill* v. *Thayer*, it may be that the amount paid by the plaintiff for the new stock cannot be claimed as a contribution by him to the trust fund for the payment of debts, the money he has paid upon that supposed stock, *as such contribution*, should be so treated.

When he paid for his stock, he paid for it *as stock*, and the intention of contributing to the trust fund cannot be imputed to him; but when he paid the *assessment* it was with the express intention of making such contribution; and though not performance of an obligation to so contribute *on that stock*, as it was for the express purpose of paying the debts, it should be credited to him on his valid stock.

The money became an actual contribution to the fund for the payment of debts, made after the failure of the bank, and while it was in the possession of an officer of the government, and the creditors have the benefit of it. The same equity exists between him and the creditors in

respect to this contribution, as to that which was made upon the valid stock.

XIII.

The evidence to prove that the $742,800 (including the plaintiff's assessment) contributed by the stockholders was actually applied to the payment of the debts of the bank, is legally competent and sufficient for that purpose.

(1). The fact appears by the books of the bank. Linus M. Price, who was Receiver at the time the testimony in this case was taken, testified to this fact in the trial of another case. (Eq. Record, p. 18).

This was clearly competent as an admission of the then defendant.

(2). It is proved by the admissions of Price in bill in equity signed and sworn to by him. (Eq. Record p. 17).

(3). It is proved by Price's deposition in this case. (Eq. Record p. 67, Ans. to Int. 14).

In the actions at law it was found specially by the Circuit Judge, that "The whole amount collected of the shareholders by voluntary assessment, $742,800, was used by the bank to pay its debts to creditors."

The admissions of Price, the then Receiver and plaintiff in the action at law, and defendant in the suit in equity, made under oath, are competent evidence.

Elliott v. *Hayden*, 104, Mass., 180, 183.

Central Bridge Co. v. *Lowell*, 15 Gray, 108, 122.

1 Greenl. Ev. (13th Ed.) Sects. 97, 169, 180, 212, last clause.

3 Greenl. Ev. (13th Ed.) Sect. 274, last clause, and last clause of note on p. 239, where it is said, "From these and other authorities, it seems clear, that the bill, if *sworn to*,

is evidence against the plaintiff as an admission of the truth of the facts therein stated. * * * The oath is proof of his knowledge and solemn assertion." The facts stated in the bill sworn to by Price were not derived from counsel, but as statements of fact within his own knowledge officially obtained. The rule admitting such evidence is believed to have been generally adopted in this country.

XIV.

No such register or list of shareholders as is required by R. S. Sect. 5210, was ever kept by the Pacific Bank (Eq. Record, p. 87). It is only such a list as is provided in that section that is "subject to the inspection of creditors." No record of stockholders in this bank, which creditors were entitled to see, contained Delano's name as a stockholder. It does not appear on the record of transfers of stock. (Eq. Record, p. 71).

The stock ledger is not such a list as creditors are entitled to see under Sect. 5210, but is simply a private book of accounts between the bank and its stockholders, who alone are entitled to see it. The president and cashier had no authority, either express or implied, to enter the name of any subscriber to the new stock upon a list kept for the benefit of creditors before the proceedings to perfect that increase had been completed. Actual knowledge that a shareholders name was upon such a list is required by Sect. 5210, before he could be charged as a contributor towards the debts of the bank on account of such entry. No estoppel, (which rests in fraud or negligence), could arise without such actual knowledge. But in the case at bar there was no such list, and no authority to make one, as the $500,000 increase was never perfected.

XV.

The certificate of the Comptroller is not conclusive evidence of an increase of the capital stock.

R. S. Sect. 5142 declares that "no increase of capital stock shall be valid," until three things are made to appear; (1) that "the whole amount of such increase is paid in;" (2) "that notice thereof has been transmitted to the Comptroller of the Currency;" (3) that the Comptroller's certificate has been obtained "specifying the amount of increase of such capital stock, with his approval thereof and that it has been duly paid in as a part of the capital of such association."

If it appears as in this case, that the whole amount of increase voted has never been paid in, the certificate of the Comptroller is not conclusive evidence of the increase because evidence of such payment is a condition precedent to the authority of the Comptroller to issue such certificate. A Comptroller's certificate proved to be false cannot bind the subscriber to the proposed new stock. It would be a fraud upon him.

The statute makes the Comptroller the judge of the evidence showing due organization of a bank, and authorizes him to decide when the bank shall commence business; and his certificate in that respect, therefore, is conclusive. R. S. Sects. 5168, 5169, 5170. But as to the increase of the stock, certain facts must be made affirmatively to appear, as we have shown, the certificate of the Comptroller being only one of those facts. It has been held in several cases that some adjudications and certificates of them made by the Comptroller with reference to liquidation and proceedings in case of insolvency of national banks are conclusive; but it is believed that it has never been held that the Comptroller's certificate that the stock of a bank had

been duly increased is conclusive. Such a decision would open too wide a door for fraud without the opportunity of contesting the fact before the Receiver, or in any Court where the personal liability of a stockholder is in question.

In the case of this bank the Receiver had the evidence before him before he issued his certificate, that the stock had not been increased according to the statute. It was contained in the vote of the directors Dec. 13, a copy of which was certified to him; and he was informed of it before that vote was passed.

This argument is respectfully submitted in the Delano case, and is substantially applicable to the cases of Mills, Taunton Savings Bank, Charlestown Savings Bank, and Morrison.

By A. P. GOULD, and
B. N. JOHNSON,
Of Counsel for Delano and the other Stockholders.

118-634

Supreme Court U. S.
FILED
OCT 13 1886

United States Supreme Court.

Nos. 789, Eq., 820, Law.

JOHN P. DELANO, *Appellant and Plaintiff in Error,*

v.

PETER BUTLER, *Receiver.*

Nos. 790, Eq., 821, Law.

HARVEY MILLS, DO., *v.* SAME.

Nos. 791, Eq., 822, Law.

TAUNTON SAVINGS BANK, DO., *v.* SAME.

Nos. 792, Eq., 823, Law.

CHARLESTOWN SAVINGS BANK, DO., *v.* SAME.

Nos. 793, Eq., 824, Law.

MORRISON, DO., *v.* SAME.

BRIEF OF THE RECEIVER.

GENERAL STATEMENT.

There is no controversy in these suits, except as to the validity of the new stock issued under the last alleged increase of the capital stock on and after Sept. 13, 1881, from $500,000 to $961,300, the adverse claim being that the same is not subject to the assessment sued for; and as to the effect of paying the voluntary assessment voted by the stockholders Jan. 10, 1882, at the annual meeting then held, the adverse claim as to that being that its payment cleared the stockholders of all further liability. Each and every other material allegation contained in the declarations in the actions at law is admitted or indisputably proved in the suits in equity, and specially found as a fact in the actions at law. (Law Cases, pp. 5, 8, 12, 13.) It is also found in the actions at law, that each of the plaintiffs in error owns the number of shares declared on. (Law Cases, pp. 60, 61.) It is not in dispute that each of them had paid

been duly increased is conclusive. Such a decision would open too wide a door for fraud without the opportunity of contesting the fact before the Receiver, or in any Court where the personal liability of a stockholder is in question.

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for the stock and held certificates for the same, and was registered as the owner thereof in the stock ledger of the bank, at the time when the association became permanently insolvent and passed into the hands of the receiver to be wound up.

All of the cases in law and equity rest substantially upon the same main state of facts, and their determination depends upon the same principles of law. Whatever slight differences there are in some of the minor details will be pointed out as this brief proceeds.

The first contention is that the new stock was illegal, and wrongfully issued by the association. It rests upon this state of facts, viz. : —

The directors, by virtue of the fifth and sixth of the articles of association (Law Records, p. 15, each case), were authorized to provide for an increase of the capital, and to regulate the manner in which such increase should be made, the maximum of increase being limited to $1,000,000. The eleventh by-law, established, reads thus (Law Cases, p. 17): —

INCREASE OF STOCK.

Sec. 11. Whenever an increase of stock shall be determined upon, it shall be the duty of the Board to notify all the stockholders of the same, and cause a subscription to be opened for such increase, and each stockholder shall have the privilege of subscribing for such number of shares of new stock as he may be entitled to subscribe for, in proportion to his existing stock in the bank. If any stockholder should fail to subscribe for the amount of stock to which he may be entitled, within a reasonable time, which shall be stated in the notice, the directors may determine what disposition shall be made of the privilege of subscribing for the new stock.

The directors on Sept. 13, 1881, passed and gave notice of this vote. (Law Cases, pp. 8, 19, ex. 4).

Voted, That the capital of this bank be increased to $1,000,000, and that stockholders of this date have the right to take the new stock at par, in an equal amount to that now held by them.

Dec. 13, 1881, they passed this vote, viz. (Law Cases, p. 9): —

Voted, That whereas it was voted by this board, on the thirteenth

day of September last, that the capital of this bank be increased to $1,000,000, and that stockholders of this date have the right to take the new stock at par in equal amount to that held by them.

And, whereas, the stockholders were duly notified of said vote, and also, that subscriptions to the new stock would be payable Oct. 1.

And whereas $461,300 of said new stock has been taken and paid in.

And whereas $38,700 thereof has not been taken and paid in.

Voted, That said $38,700 of said stock be, and is hereby cancelled and deducted from said capital stock of $1,000,000, and that the paid-up capital stock of this association amounts to $961,300.

Voted, That the Comptroller of the Currency be notified that the capital of this association has been increased to the sum of $461,300, and that the whole amount of said increase has been paid in as part of the capital of this association, and that he be requested to issue his certificate of said increase to this association, according to law.

Upon the first vote being passed and notice thereof given, the stockholders proceeded separately to take the new stock, paying therefor and accepting the certificates for the same, the amount of $461,300 having thus been taken before Nov. 18, 1881, when the bank suspended business. The rest of the voted increase not being taken, the directors, after conference with the Comptroller of the Currency, passed the second vote, which was transmitted by the cashier of the bank, and the said Comptroller for the first time took action upon the matter and gave his certificate. (Law Cases, p. 10.)

PACIFIC NATIONAL BANK OF BOSTON,
December 13, 1881.

TO THE COMPTROLLER OF THE CURRENCY,
Washington, D. C.

It is hereby certified that the capital stock of "The Pacific National Bank of Boston" has been increased pursuant to the articles of association of said bank, in the sum of four hundred and sixty-one thousand three hundred dollars, all of which has been paid in, and that the paid-up capital stock of said bank now amounts to nine hundred sixty-one thousand three hundred dollars.

[SEAL] J. M. PETTENGILL, *Cashier*.

TREASURY DEPARTMENT,
OFFICE OF COMPTROLLER OF THE CURRENCY,
WASHINGTON, Dec. 16, 1881.

Whereas, satisfactory notice has been transmitted to the Comptroller of the Currency that the capital stock of "The Pacific National Bank of Boston, Mass.," has been increased in the sum of four hundred and sixty-one thousand three hundred dollars, in accordance with the provision of its articles of association, and that the whole amount of such increase has been paid in:

Now, it is hereby certified that the capital stock of "The Pacific National Bank of Boston, Mass.," aforesaid, has been increased as aforesaid in the sum of four hundred and sixty-one thousand three hundred dollars; that said increase of capital has been paid into said bank as a part of the capital stock thereof; and that the said increase of capital is approved by the Comptroller of the Currency.

In witness whereof, I hereunto affix my official signature.

[SEAL] JOHN J. KNOX,
Comptroller.

The bank was in the control and under the direction of Daniel Needham, a national bank examiner, acting under the orders of the Comptroller, from Nov. 18, 1881, until March 18, 1882, when it resumed business by permission of the Comptroller, having, as was supposed and believed, been put meanwhile into a condition of solvency. It continued in business as a banking association until May 20, 1882, when it became permanently insolvent, and passed into the hands of the receiver to be wound up. (Law Records, pp. 9, 12.)

It had been put into a condition of supposed solvency in this way:—

The said Comptroller, on Dec. 16, 1881, by request of the directors (p. 30, Law), gave the following notice under Rev. Stat., Sect. 5205:—

WASHINGTON, December 16, 1881.

The Pacific National Bank of Boston, Massachusetts:

The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars having been lost, notice is hereby given to said bank, under the provisions of Section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent upon its shareholders *pro rata* for the amount of capital stock held by each,

and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of Section 5234 of the Revised Statutes of the United States.

In testimony whereof, I have hereto subscribed my name, and caused my seal of office to be affixed to these presents at the Treasury Department, in the city of Washington, and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL] JOHN J. KNOX,
Comptroller of the Currency.

On Jan. 10, 1882, at the regular annual meeting, called generally as such (Law Cases, pp. 11, 42, 45), the stockholders by a stock vote of nearly two thirds in amount passed the following, to wit: —

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent upon the shareholders of the Pacific National Bank, of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment and collect the same forthwith.

The sum of $742,800 (Law Cases, p. 13) was paid of this voluntary assessment, and used by the bank in its business, $643,700 of the same having been paid before resumption (p. 14).

Mr. Delano, who held thirty shares of old stock, and took upon notice the same number of the new, paying the money therefor and taking the certificates, did not attend the stockholders' meeting, but paid the assessment upon notice of the vote, having it indorsed on his certificate.

Eq. Case, pp. 81, 86, 87.
Law Case, pp. 59–61.

This party was fertile in *suppositions and beliefs*, as he swears now and is found (p. 60)!

Mr. Mills, who held twenty shares of old stock, bought ten rights, and took thirty shares of the new stock, paying the money and accepting the certificates; did not attend the meeting, but upon notice paid the assessment.

Eq. Case, pp. 81–87.
Law Case, pp. 59–61.

The Taunton Savings Bank, which held no old stock, bought two hundred shares of the new, or the right to the same, in a real-estate trade with one Marcus, and took the certificates of the bank; was represented at the meeting of the stockholders, but its officer attending took no active part in the proceedings. It paid the voluntary assessment upon notice.

Eq. Case, pp. 81, 82, 91, 92, 93, 94, 95, 98, 101.
Law Case, pp. 59–61.

The Charlestown Savings Bank bought and took a transfer of sixty shares of old stock, Sept. 17, 1881, got rights, and took one hundred and forty shares of the new, paying the money and taking the certificates for the same. It was represented at the stockholders' meeting, but the person attending took no active part. The assessment was paid upon notice of the vote.

Eq. Case, pp. 81–89, 90–95.
Law Case, pp. 59–61.

Mr. Morrison held twenty-five shares of the old stock, took twenty-five of the new, attended the meeting, and voted for the assessment with full knowledge of the facts, and paid the same, with an agreement that the money should be refunded if the bank did not go on in business.

Eq. Case, pp. 76, 77, 78, 79, 81–3–4–8.
Law Case, pp. 58–61.

All of the plaintiffs in error were registered in the stock ledger as the owners of the stock, and so remained.

Delano's Case, Eq. p. 87. Law, p. 60.
Mills's Case, Eq. p. 87. Law, p. 61.
Taunton Savings Bank, Eq. p. 101. Law, p. 60.
Charlestown Savings Bank, Eq. p. 95. Law, p. 60.
Morrison's Case, Eq. 71, 72. Law, p. 59.

All, except Morrison, swear in the suits in equity, and it is found in actions at law, that they did not know of the reduction in the proposed increase of capital stock. All were advised that the payment

of the voluntary assessment cleared them from further liability, and they paid, foolishly so supposing or believing.

There is no proof in the suits in equity that the appellants used diligence in making inquiry, or took any steps to repudiate the new stock, but to the contrary thereof.

Delano's Case, Eq. pp. 82, 83, 84, 86.
Mills's Case, Eq. p. 81 to 87.
Taunton Savings Bank, Eq. pp. 81 to 101.
Charlestown Savings Bank, Eq. pp. 81 to 94.
Morrison knew all the facts, pp. 78 to 89.

In the actions at law no diligence or any steps taken to repudiate the said stock are found as facts.

Neither did the court below find, in the actions at law, any fraud as a fact, on the part of either the insolvent bank or any one else.

In the suit in equity the error assigned in the appeals is confined to one point, it being in these words: —

"And this appellant assigns for error in said judgment and decree of the Circuit Court that the Circuit Court ought to have held and adjudged that the complainant had in equity satisfied and extinguished the alleged liability which the defendant was seeking to enforce against him in said action at law, and ought to have restrained the defendant from further prosecuting said action against the complainant, and that the Circuit Court erred in not so doing."

The facts answering all the allegations of the declarations, as found by the court below, appear in the law records on following pages: —

As to creation of the bank, p. 8.
As to failure, and appointment of receiver, p. 12.
As to assessment by Comptroller, and demand, pp. 13–15.
As to ownership of stock, pp. 60, 61.

ARGUMENT.

We submit: That the adverse contention is without foundation in law or equity. There are many reasons, either one of which is sufficient for an answer.

I. The directors had full power to increase the capital stock, within the prescribed limit of $1,000,000, and the same is not therefore *ultra vires* within the doctrine of Scoville *v.* Thayer, 105 U. S. 143.

Sect. 5142 of the Revised Statutes says that the association may, by its articles of association, provide for an increase of its capital from time to time, subject to limitations prescribed by law, the maximum of increase to be provided in the articles of association to be determined by the Comptroller; and no increase of capital is to be valid until the whole amount of such increase is paid in, notice transmitted to that officer, and his certificate obtained, with his approval thereof.

The amount of capital stock is fixed by Article 5, of the articles of association, with a provision for an increase not exceeding $1,000,000. By Article 6, the directors are given authority to "provide for an increase of the capital stock, and to regulate the manner in which such increase shall be made," and to make by-laws, and articles of association.

They made the by-law No. 11, which has been cited hereinbefore in full. (Law Records, p. 17.)

In order to make the voted increase effectual as an accomplished fact, the whole amount must be paid in and the Comptroller approve. (Charleston *v.* People's Nat. Bk. 5 (Rich.) So. Car. 103.) Until this is done the proceedings are inchoate, and the amount is subject to changes. The power of the directors was not exhausted by the first vote, and was not fully executed until the Comptroller of the Currency received notice, and gave his approval and certificate. (Law Cases, p. 10.)

II. There was at best only an informality or irregularity in the proceedings, in that a general subscription paper, with proper conditions, was not opened, and no stock issued until the whole amount, voted and subscribed for, had been paid in and the approval and certificate of the Comptroller obtained. But the by-law made by the directors under Article 6 of the articles of association was for the association and sharehhlders only, and such formality might be waived. Each stockholder might be allowed to subscribe and pay separately, and the cer-

tificates be given accordingly, if the parties saw fit to adopt that course, as was done.

Piscat. Ferry Co. *v.* Jones, 39 N. H. 491.

It was not necessary for all first to subscribe.

Chubb *v.* Upton, 95 U. S. 665; approving
Ren. & W. P. R. Co. *v.* Westel, 21 Barb. 56.

Subscriptions and issues of stock were without conditions.

At all events, that course having been pursued, it was only an informality, which cannot be availed of as a defence in a suit brought by the receiver, as the representative of the creditors, to enforce the individual liability. The parties having taken the certificates, paid for the stock, and being registered and held out to the public as the owners, are estopped from alleging the nullity of the stock.

Upton *v.* Triblecock, 91 U. S. 45.
Chubb *v.* Upton, 95 *id.* 665.
Pullman *v.* Upton, 96 *id.* 328.
Scoville *v.* Thayer, 105 *id.* 143.
Sanger *v.* Upton, 91 *id.* 56.

III. The parties, by accepting and holding the certificates and enjoying the rights and chances of ownership, are estopped from denying such ownership after the bank has failed, and the rights of the creditors have accrued.

Sanger *v.* Upton, 91 U. S. 56.

IV. It is immaterial whether they had actual knowledge of the entries in the stock ledger, or gave any express authority therefor, or not.

Rev. Stats., Sect. 5210, requires that a full and correct list of the names and residences of all the shareholders and the number of shares held by each shall be at all times kept in the office where the business of the association is transacted, subject to the inspection of shareholders and creditors, and a verified copy is to be sent to the Comptroller of the Currency, each year.

The issuing of the stock by the bank, and the acceptance of the certificates by the parties, made it the duty of the officers of the

bank to cause the entries to be made. There was an implied authority given by stockholder, and he was bound to assume that that had been done which the law required to be done, and to govern himself accordingly.

Webster *v.* Upton, 91 U. S. 65.

It is enough that the stockholders caused the entry to be made.

In re Bk., 22 N. Y. p. 17.

The conclusive effect of the register under such circumstances has been too often the subject of adjudication to require discussion.

Anderson *v.* Phila. Warehouse Co., 111 U. S. 479.
Davis *v.* Stevens, Brown's Nat. Bk. Cases, 158.
Bowdell *v.* F. & M. Nat. Bk., *id.* 146.
Davis *v.* Essex Bap. So., 44 Conn. 582.
Irons *v.* Man. Nat. Bk., The Reporter, July, 1886, p. 69.
Adderly *v.* Storm, 6 Hill, 624.
Johnston *v.* Laflin, 103 U. S. ~~304~~. 800.
Brown *v.* Adams, 5 Biss. 181.
In re Bank, 22 N. Y. 17.

V. The certificate of the Comptroller of the Currency is conclusive upon the subject matter of the increase of the capital stock. The doctrine established in the following cases, as to the certificate of organization, the appointment of the receiver, and the assessment to enforce the personal liability, applies with equal force to the certificate given and action taken under Sect. 5142 of the Revised Statutes.

Casey *v.* Galli, 94 U. S. 679.
Cadle *v.* Baker, 20 Wall. ~~640~~. 650.
Kennedy *v.* Gibson, 8 *id.* 498.
Thacher *v.* W. R. Nat. Bk., 19 Mich. 196.
National Bk. *v.* Case, 99 U. S. 628.
Rev. St., Sect. 5142.
Sanger *v.* Upton, 91 U. S. 56.

VI. If the court goes behind this certificate, then we submit, in addition to what has been already said on these points: The parties,

knowing the existing contingencies, were bound to heed and to look out for them, and, if they had any objection to the ultimate action, to make the same seasonably, that is, promptly and without delay. The directors were made the agents of the stockholders to provide for and to regulate the matter of the increase of the capital stock, and if it was not all taken within a reasonable time they were to determine what disposition should be made of the privilege of subscribing (by-law No. 11). The knowledge of the agents charged with the duty was the knowledge of the principals. The books of the banks showed all the facts, and were subject to the inspection of the stockholders, made so by law. The bank suspended Nov. 18, 1881, and did not resume business until March 18, 1882, and the parties knew of an assessment being made of one hundred cents on a dollar, which they paid. It was for the stockholders to inform themselves of the facts under these circumstances, and not to lie supinely by until the final failure, taking their chances of success and gain.

By the evidence and proof in the suits in equity they showed no diligence, and did not take the requisite steps to repudiate the new stock, if entitled to do so, and their mouths should now be shut when they attempt to disavow the new stock in defence. (Upton *v.* Triblecock, 91 U. S. 45; Thompson, Lia. of Stockholders, Sect. 150 and notes.)

They were at least bound to show affirmatively, in the actions at law, that they used due diligence, and took the requisite steps to repudiate before they could make the alleged objection available. No such facts are found by the court below, and the facts found prove the reverse thereof. They actually paid the voluntary assessment. Mr. Morrison did it with full knowledge, and the others did it when they were bound in law and equity to first inquire and learn the facts.

The stockholders, by voting and paying the voluntary assessment, ratified the proceedings. (Sewell's Case, L. R., 3 Ch. 131.)

VII. The evidence in the suits in equity does not prove that there was any fraud upon the part of the bank, in the proceedings in question, and none was ever claimed or found by the court in the actions at law. There was no request for any ruling in matter of law, or exception taken, on such an assumption, nor was the court below asked

to find fraud as a fact on the part of any one. If the court is now asked to infer fraud as matter of law, from the facts found, we submit that it is not competent for them to do so, in this state of the record. If it is claimed that the general request that the receiver could not recover upon the facts found, comprehended fraud and all proper inferences from the specific facts found, then we have to say: That the general request and the general ruling in denial of the request and to the contrary thereof, also comprehended the questions of waiver, want of diligence, ratification, etc.. already discussed. In the absence of any specific request and special exception on the subject of fraud, the court cannot find error.

But we submit as a matter of fact and law, that this court cannot properly infer fraud from anything which is found by the court below. All that the counsel has to base such a claim on is this paragraph found on page 13 of the law records, in the exact language of the extract from a bill in equity filed and sworn to by the receiver in a suit brought in behalf of the stockholders themselves as well as the creditors, against the directors and officers of the bank, charging them with neglect of duty, and for the losses incurred, by reason of their misconduct. (Eq. Cases, pp. 17, 18.)

This paragraph reads as follows (Law Cases, p. 13), viz.: —

"On September 13, 1881, and long before that date, the surplus and undivided profits of said bank, then and for some time thereafter nominally standing upon the books of said bank, had been in fact exhausted, and the capital stock of the said bank had been wholly lost through losses by bad debts and by loans improvidently made by said bank; * * * in fact, the bank at that time had lost its entire capital and was then insolvent; * * * said bank when it suspended or failed, Nov. 18, 1881, was deeply and hopelessly insolvent; * * * on Sept. 13, 1881, the directors voted an increase of the capital stock, the old stockholders having the right to take up the new stock at par; the actual condition of the bank was misstated to or concealed from the stockholders and the Comptroller of the Currency, and thereby the stockholders were induced to take up the new stock at par, and to pay into the bank money for the same, to the amount of $461,300; * * * the bank, after obtaining the sum of $461,300 for said new stock, continued in busines still Nov. 18, 1881, when it
17 failed; at the time of the failure the capital of the bank had all been lost, together with the $461,300 paid in for subscriptions to new stock, that being all which was subscribed for on the increase voted Sept. 13, 1881."

It was objected to as incompetent evidence in the suits in equity, and that objection is now open and insisted upon. (Eq. Cases, pp. 17, 18.) The court held it competent, and admitted it, in the actions at law, against objection, and found the facts in the exact language of the extract separated from the rest of the sections of the bill in which the language occurs. (Delano's Eq. Case, p. 72.) As no exception taken by the receiver was put into the record in the actions at law, because of the judgment being in the receiver's favor, none can now be considered by the court. The court below thought it better, probably, to make rulings most favorable to the plaintiffs in error as to the admission of this evidence.

It will be seen that the charges made cannot properly be made evidence in favor of the stockholders, because the receiver in that bill in equity set them up in their behalf and as their own representative. Besides this, they were not *sui juris*, and come within the exception to the general rule of evidence wherever adopted.

1 Greenl. Ev., Sect. 212.
3 Greenl. Ev., Sect. 274 and notes.
2 Wharton on Ev., Sect. 1119.
Boileau *v.* Rutlin, 2 Ex. R. 665.
Doe *v.* Sybourn, 7 T. R. 3.
Combs *v.* Hodge, 21 How. 397.

In the action at law, as stated, the language used is that of the alternative charge made in the bill for proof. While "misstatement or concealment" is found (it does not appear which), neither is found to be fraudulent. The charges are general, with no particulars given, either as to persons or facts. Whether the party who is chargeable with the same, represented, or could bind, the bank, or whether either of the plaintiffs in error was deceived, and induced to act, when he otherwise would not have done so, is not found by the court. There may have been only an honest error of opinion.

In Mr. Morrison's case alone, it is found that when he paid for the new stock (not when he subscribed), he was informed by the officers of the bank (*what officers* does not appear), that the bank was sound and solvent (Law Case, p. 58), and had learned just previously that the stock was selling for 112, and was selling when he paid (Oct. 4, 1881) at 108.

None of the other parties in the suits in equity swear to any misrepresentations made, or deceptions practised, as to them, and none are found in the actions at law.

But independently of those questions of fact, we submit: If directors or officers representing the bank did make misstatements, or practised concealment, as to the actual pecuniary condition of the bank, when the vote was passed, and the parties were induced thereby to take the new stock, this will not avail as a defence. Whatever remedy the stockholder might have as against the party committing the wrong, it cannot affect the right of action which the innocent creditors have, through the receiver, to enforce the personal liability of the stockholders, especially upon the other facts found.

Ogilvie *v.* Knox Ins. Co., 22 How. 380.
Upton *v.* Triblecock, 91 U. S. 47.
Chubb *v.* Upton, 95 U. S. 665.
Payson *v.* Withers, 5 Bliss. 269.
Oakes *v.* Turquant L. R., 2 H. L. 325.
Stone *v.* City & C. Bk., 3 C. P. Div. 307.
Wright's Case, L. R. 7 Ch. Ap. 60.
Henderson *v.* Royal B. Bk., 7 El. & Bl. 356.
Daniel *v.* R. B. Bk., 1 H. & N. 681.
2 Morawetz on Corp., Sect. 839, 840, notes.

This was held to be the law in cases brought upon subscriptions for stock where the assignee stood on the rights of the association primarily; *a fortiori* where, as here, the receiver is enforcing an obligation which he must enforce, and which the association never could have enforced.

We submit, therefore, that there is no error in matters of law, affecting the finding of the court below, that each of the plaintiffs in error owned the number of shares of stock set up in the respective declarations.

VIII. There can be no doubt that the notice of the cashier, of Dec. 13, 1881, and the certificate by the Comptroller of Dec. 16, 1881, were admissible in evidence, they being papers given in the discharge of official duty, under Sect. 5142, Revised Statutes.

The record of the stockholders' meeting (Ex. 9) is conceded to be

competent for some purposes, and to a certain extent. The objections went to its weight as evidence after that. It is not to be presumed that the Court made any improper use of the same. When the case was put in by the use of the record evidence in the suits in equity, as stated hereinafter, it was supposed that the plaintiffs in error claimed and were going to contend that there was fraud, as well as to contest the validity of the increase of the capital stock and the effect of the payment of the voluntary assessment. Hence, what was said and occurred at that meeting was competent, as showing knowledge, ratification, etc. It showed means of knowledge for those not present, and the object and purpose of the assessment then made, and the vote under which the same was paid.

The other exhibits objected to were official records and communications, bearing upon the question of good faith, and showing the history of the transactions in question, with facts affecting the alleged equity growing out of the payment of the voluntary assessment. Much, if not all, of the evidence objected to became immaterial at the close of the trial, no claim of bad faith being then insisted upon.

The facts in relation to suits being brought against the bank after resumption, and security given by the bank to the sureties in the bonds given to dissolve the attachments made, and the agreements with creditors for extension of debts (Ex. 14), were competent as bearing upon the equity set up, they showing that there was not a *pro rata* distribution among the creditors of the money realized, and how some extended and others did not, and how the relative positions of the two classes changed.

The court will find the explanation why the records were made so voluminous in the fact that the statements of the facts and evidence agreed, and the depositions taken, as found in the bills in equity, were by agreement used as the only evidence and proofs in the actions at law, subject to legal objections as to competency. A comparison of the corresponding records in law and equity will show this, they being the same in substance, with only a change of phraseology necessary for adaptation. In the suits in equity the appellant sought, apparently, to bring in anything and everything which might by possibility raise questions in equity. The extraneous matter was

not omitted when the statement of facts, to be found in the actions at law, was drawn by the plaintiffs in error.

In any event, the evidence objected to is claimed to be, and is, at best, only immaterial and irrelevant. Such evidence is not allowed to disturb the judgment unless it appears to have affected prejudicially the result, according to a well-settled rule.

Mining Co. *v.* ~~Thayer~~ Taylor, 100 U. S. 37.

There was no prejudice, if we are right in our previous contentions. In any event, and irrespective of all this evidence, upon the undisputed facts of the case, the plaintiffs in error were the owners of the stock declared on, for all the purposes of the suits, and that was really the only issue in dispute and to be tried, either in the equity or the law cases.

IX. The special exceptions are only as to matters of detail embraced in the general claim. They have already been dealt with sufficiently in the prior discussion. It may be remarked that the court below was more favorable to the plaintiffs than the law would warrant, as to the effect of the registry of the new stock in the stock ledger. The other prayers relating to the ownership of the stock were not comprehensive enough as regards the facts found, but were partial and incomplete in their assumptions. It is enough any way that the Court ruled comprehensively upon the facts found, that the receiver was entitled to recover, because, if that is so, it is immamaterial whether the Court declined erroneously to grant some of the subordinate requests or not.

X. We come now to the contention that the payment of the voluntary assessment cleared the parties, either in law or equity, from the alleged personal liability. It is difficult to argue this matter seriously, as the groundlessnes of this claim, as well as the other, is so apparent. We need not argue the point that the opinion and advice of Daniel Needham, the bank examiner, or any one else, had any legal effect. That cannot change or affect the legal *status*. What the parties supposed or believed is of no consequence.

Upton *v.* Triblecock, 91 U. S. 45.

If the money was paid under such circumstances as to entitle the

parties to recover it back, the matter must be presented as a claim for proof before the receiver, as one of the debts of the bank.

The personal liability of the stockholders runs to the creditors of the bank as they stood at the time of the final insolvency and the appointment of the receiver. It is virtually a contract obligation existing between each stockholder and the creditors.

Hawthorne *v.* Calef, 2 Wall. 10.
Curran *v.* State of Arkansas, 15 How. 304.
Irons *v.* Man. Nat. Bk., *The Reporter*, July, 1886, p. 69.

It is to be enforced by and through the receiver as the representative of the creditors.

Act of June 30, 1876.
Irons *v.* Man. Nat. Bk., *The Reporter*, July, 1886, p. 69.

It follows that no money paid to the bank itself, and expended by them, can operate as a satisfaction or extinguishment of this liability.

The money due and to be realized out of this personal liability constitutes a trust fund to be administered by a government officer in a *pro rata* distribution among all of the creditors existing at the time of the failure. The bank has nothing to do with its collection or distribution. In the present instance the bank expended the money paid to it on the voluntary assessment, just as it saw fit, and not in a *pro rata* distribution among the creditors. It was paid out by the bank, as a debtor, to its creditors. Some got a part of their debt. Some got none. Some got all either in money or in full security, having sued and attached and got a bond with sureties indemnified by means of the property of the bank. The debts accrued subsequent to the resumption of business were large, and $200,000 of the same were outstanding at the time of the failure. (Law Cases, p. 14.) The new deposits were $2,338,617.21. (Law Cases, p. 12.) Some extended their debts and some did not. (Law Cases, p. 13.) The money went to enhance the value of the stock, and the stockholders took the chances of the resumption, which was made possible only by means of the assessment.

Money paid for one purpose and used for that cannot be applied to another one, such as that now in question.

Scoville *v.* Thayer, 105 U. S. 143, 153.

The laying of a voluntary assessment, and the collection of the same, for the purpose of making up a deficiency in the capital stock, and to prevent the bank being wound up by a receiver, was never intended to take the place of the security guaranteed to creditors by the provisions of statute creating the personal liability of the stockholders.

Rev. Stats., Sect. 5151, provides that "the shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for the other, for all contracts, debts and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, *in addition to the amount invested in such shares.*" The money paid for voluntary assessment was represented only by the shares.

Rev. Stas. 5205, provides that "every association whose capital stock shall have become impaired by losses or otherwise, shall within three months of the receiving notice thereof from the Comptroller of the Currency, pay the deficiency in the capital stock by assessment upon the shareholders *pro rata*, for the amount of the capital stock held by each," with the alternatives specified in case of a neglect to do so, one of which is a proceeding to wind the bank up through a receiver.

Under this act, the Comptroller was asked to, and gave, the following notice, (Law Cases, pp. 11, 31) :—

WASHINGTON, Dec. 16, 1881.

The Pacific National Bank of Boston, Massachusetts:

The entire capital stock of the Pacific National Bank of Boston, Massachusetts, amounting to nine hundred and sixty-one thousand three hundred (961,300) dollars, having been lost, notice is hereby given to said bank, under the provisions of section 5205 of the Revised Statutes of the United States, to pay the deficiency in its capital stock by an assessment of one hundred (100) per cent upon its shareholders *pro rata* for the amount of capital stock held by each, and that if such deficiency shall not be paid, and said bank shall refuse to go into liquidation, as provided by law, for three months after this notice shall have been received by it, a receiver may be appointed to close up the business of the association according to the provisions of section 5234 of the Revised Statutes of the United States.

In testimony whereof I have hereto subscribed my name and

caused my seal of office to be affixed to these presents, at the Treasury Department, in the city of Washington and District of Columbia, this sixteenth day of December, A. D. 1881.

[SEAL] JOHN JAY KNOX,
Comptroller of the Currency.

It was in pursuance of this notice that the stockholders at the next annual meeting proceeded to make the assessment (Law Cases, pp. 44, 46) : —

Voted, In accordance with the notice of the Comptroller of the Currency, dated Dec. 16, 1881, there be, and hereby is, laid an assessment of one hundred per cent upon the shareholders of the Pacific National Bank, of Boston, Mass., *pro rata* for the amount of capital stock of said bank held by each shareholder.

Voted, That the board of directors notify each shareholder of said assessment, and collect the same forthwith.

It is immaterial, so far as the creditors are concerned, whether there should have been a special notice of the proposed assessment in the call for this meeting or not. A large majority voted for the same, and $742,800 out of $961,300 was paid. If a special notice was requisite the matter could be, and was, waived by those who paid, as they knew what the notice given was.

Whatever was paid, was required by the vote to be paid on account of the capital stock, and that was the effect of the payment, whatever use was made of the money after payment.

It is unnecessary to notice further the specific requests on this subject.

There is clearly no ground for relief in equity, if the court has any jurisdiction in equity at all, which is denied. The remedy for the receiver is by action at law, as the assessment of the Comptroller is for the full value of the stock.

The certificate of the Comptroller is conclusive as to everything except the ownership of the stock, as already shown.

Kennedy *v.* Gibson, 8 Wall. 498.
Nat. Bk. *v.* Case, 99 U. S. 628.

In conclusion we remark generally: That the stockholders have combined to resist efforts to enforce the individual liability which

they incurred under an express provision of the law which is fundamental in the National Banking Act. The cases before the court are only a few of the three hundred and more analogous cases, designed as test cases to settle the law. All of the rest await the decision of this court in the cases at bar.

The first ground of objection is purely technical, inasmuch as it made no substantial difference whether the capital stock was increased to $1,000,000 or to $961,300, the ratio of interest of each stockholder being the same in either event. Such an objection would never have been heard of if the bank had succeeded after resumption. Whatever may be said as to the voluntary assessment and its object and operation in the minds of the plaintiffs in error, it was manifestly a scheme, allowed by express statute, and adopted, for the specific purpose of preventing the bank from being wound up, and to save the stock to the shareholders. Whatever may be said about the opinion and advice given the stockholders as to the effect of paying the assessment, it was manifestly based upon the assumption that the bank would go on permanently and succeed in business. It was a matter which was apparent. Most of the plaintiffs in error were business men and bank directors, presumably understanding the law. The result was disastrous to be sure. But the parties took their chances of success and gain, and must stand the burden. The stability of the national banking system depends largely upon the individual liability of the shareholders as a security for the public.

There is no doubt about the good faith of the Comptroller of the Currency. The reports made to him were such as to command full credit, and to assure him that the bank had been put into a condition of solvency, and he acted upon that belief, when he permitted it to resume business. When he suggested or approved of the final action in regard to the increase of stock, he found that the amount of $461,300 had been taken and paid in and certificates issued therefor; that the parties accepting had gone on without waiting for, or first asking, his approval, taking their risk of the same, and of the whole proposed amount being taken; that there was only the small balance of $38,700 not paid for and issued; that the bank had used and lost the money as part of its active capital. He could reasonably do nothing else than to approve of the final action, and give his certifi

cate, as was done. A large majority of the stockholders approved the action taken by voting for and paying the voluntary assessment to the extent of $742,800, and taking the requisite steps to have the bank continue in business. It is too late now to complain of him. As to the directors and others concerned, there is no reason to be found in the record which will justify charging them with bad faith. At best there was only a misjudgment in estimating the value of the paper assets of the bank. A long time was consumed in canvassing them. Mr. Best was employed as an accountant. The bank examiner made full examinations, as well as the directors. (Law Cases, pp. 53 to 54.)

At the annual meeting, held Jan. 10, 1882, several new directors were chosen, and a new president was elected, and the bank started again under favorable auspices, getting in cash in two months over $2,000,000 of new deposits. But the old paper and assets did not prove to be so valuable as estimated, and the bank went down, without having made any losses on new loans, but leaving paper which had been growing worse and worse, and out of which the receiver has been enabled to realize but little comparatively.

The laying and payment of the voluntary assessment were disastrous and unfortunate for the stockholders, as it proved. But this is no reason why they should not meet the individual responsibility which continued under the law, after the bank resumed, for the security of the present and future creditors. (See circular and notice of the president, Law Cases, p. 57, Ex. 15; Ex. 14, 15, 17.)

We submit that the bills in equity should be dismissed, and the judgments in the actions at law should be affirmed with costs in each suit. But if for any reason any error is found in the latter, a full new trial should be granted upon the facts and the law, as the receiver took exceptions to the admission of some of the evidence, which are not before the court.

A. A. RANNEY.